TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1906

No. 838

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, PETITIONER,

vs.

A. D. SHERWOOD, AS SPECIAL ADMINISTRATOR OF THE ESTATE OF CLARENCE Y. HOPE, DECEASED

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

(31,406)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 683

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, PETITIONER,

vs.

A. D. SCHENDEL, AS SPECIAL ADMINISTRATOR OF THE ESTATE OF CLARENCE Y. HOPE, DECEASED

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

INDEX

	Original	Print
Record from the district court of Steele County	1	1
Summons	1	1
Bill of complaint	2	1
Answer	7	4
Reply	10	5
Supplemental answer	11	5
Second supplemental answer	15	7
Settled case	18	9
Caption	18	9
Appearances of counsel	18	9
Colloquy between court and counsel	19	9
Testimony of Myrtle Hanlon	22	11
Sam Woods	35	19
Fred A. Elder	49	28
Ida Price	62	36
Jessie Hope	66	39
Offers in evidence	72	43
Defendant's motion for a directed verdict	75	45
Charge to jury	77	45
Colloquy between court and counsel	84	49
Plaintiff's Exhibit 1—Letters of administration	85	50
Plaintiff's Exhibit 2—List of cars	87	51
Defendant's Exhibit A—List of cars	87	51
Plaintiff's Exhibit No. 3—Train order No. 21, February 4, 1923	89	52

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 23, 1925

	Original	Print
Defendant's Exhibit B—Train order No. 10, February 4, 1923	90	53
Defendant's Exhibit C—Workmen's Compensation Law.	90	53
Defendant's Exhibit D—Commissioner's certificate to proceedings before Industrial Commission	141	81
Exhibit A—Application of C., R. I. & P. Ry. Co. for arbitration	143	82
Exhibit B—Answer	144	82
Exhibit C—Designation of arbitrator	146	83
Exhibit D—Findings of arbitration committee	147	84
Exhibit E—Letter from Davis & Michel to Ralph Young, March 26, 1923	149	85
Exhibit F—Decision in review	150	85
Exhibit G—Notice of appeal	158	90
Exhibit H—Notice of hearing before district court on appeal from decision of Industrial Commission	159	90
Exhibit—Judgment of district court	162	91
Defendant's Exhibit E—Administator's petition	167	94
Administrator's bond	168	95
Oath of administrator	170	95
Appointment of E. R. Byers as administrator	170	96
Order for notice of appointment	172	96
Clerk's certificates	173	97
Defendant's Exhibit F—Proceedings in the case of Byers vs. Hope in district court of Polk County	176	98
Judge's certificate	176	98
Clerk's certificate	177	98
Petition	178	99
Original notice	184	102
Notice of attorney's lien	185	102
Stipulation re evidence	186	103
Order settling case	186	103
Verdict	187	103
Motion for judgment or a new trial	188	104
Order denying motion for judgment or a new trial	193	106
Memorandum, Senn, J	194	107
Judgment	198	109
Notice of appeal	199	110
Bond on appeal	(omitted in printing)	201	110
Proceedings in supreme court of Minnesota	205	110
Assignments of error	205	110
Opinion, Dibell, J	210	113
Petition for stay	229	122
Order for stay	230	122
Judgment	231	122
Clerk's certificate	232	123
Order allowing certiorari	233	123

[fol. 1] **IN DISTRICT COURT OF STEELE COUNTY**

A. D. SCHENDEL, as Special Administrator of the Estate of Clarence Y. Hope, Deceased, Plaintiff,

vs.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Defendant

SUMMONS

You the above named defendant, are hereby summoned and required to answer the Complaint of the plaintiff in the above entitled action, a copy of which Complaint is hereto annexed and herewith served upon you, and to serve a copy of your Answer to said Complaint upon the subscribers at their offices at 419 Metropolitan Bank Building, in the City of Minneapolis, County of Hennepin, and State of Minnesota, within twenty days from the service of this Sum-
[fol. 2] mons upon you, exclusive of the date of such service; and if you fail to so serve a copy of your Answer to said Complaint upon the subscribers within the time aforesaid, the plaintiff will apply to the Court for the relief demanded in said Complaint.

Dated this 21st day of February, 1923.

Davis & Michel, Plaintiff's Attorneys, 419 Metropolitan Bank Bldg., Minneapolis, Minnesota.

IN DISTRICT COURT OF STEELE COUNTY

[Title omitted]

BILL OF COMPLAINT

Plaintiff for a Complaint in the above entitled action alleges and shows to this court:

1st. That defendant now is and at all times herein mentioned has been a railroad corporation duly organized and existing, and as such
[fol. 3] operating commercial lines of railroad in the States of Minnesota, Iowa, and other states, hauling freight and passengers thereon as a common carrier for hire.

2nd. That on and previous to the 4th day of February, 1923, the above named Clarence Y. Hope, deceased, was employed by defendant as its agent and servant and as a railway freight conductor, and as such it was a part of his duties to be in railway cabooses of defendant, and to do the work commonly and ordinarily done by railway freight conductors.

3rd. That on the 13th day of February, 1923, the above named Clarence Y. Hope died intestate near the City of Chariton, Iowa, and left him surviving, as his heirs at law his widow, Jessie Hope, his son, Harry R. Avitt, his daughter, Ada M. Avitt, and his daughter, Dorothy L. Avitt.

4th. That thereafter and on the 20th day of February, 1923, the above named plaintiff, A. D. Schendel, was by the Probate Court of Hennepin County, a court having jurisdiction duly appointed as Special Administrator of the Estate of Clarence Y. Hope, deceased, and as such duly filed his oath and bond and in all things qualified as such Special Administrator and is now the duly acting and qualified Special Administrator of the estate of Clarence Y. Hope, deceased, and as such Special Administrator brings this action for and in behalf of Jessie Hope, the widow of Clarence Y. Hope, deceased, and Harry R. Avitt, Ada M. Avitt, and Dorothy M. Avitt, the children of Clarence Y. Hope, deceased.

5th. That at the time of the injuries to and the death of decedent, [fol. 4] as herein set forth, defendant was a railroad corporation engaged and working in interstate commerce; and that at the time of the injuries to decedent, he was working for defendant as its agent and servant and as such was engaged in interstate commerce.

6th. That on the 4th day of February, 1923, while decedent was empolyed, as aforesaid, it became and was necessary for him and it was his duty to act as a railway freight conductor on one of defendant's trains, which said train ran into and through the Village of Pershing, Iowa; that on the 4th day of February, 1923, at about 12:30 P. M., it became and was necessary for decedent, acting in the line of his duties and within the scope of his employment, to be in, around, and about the caboose of said train; that while plaintiff was so working, as aforesaid, the defendant, its agents and servants, wilfully, wantonly, negligently, recklessly and carelessly ran a certain locomotive, with a train of cars attached, into and against said train upon which decedent was so working, with great force and violence, derailing the said caboose, and hurling decedent through the air a considerable distance; that while decedent was so working in and about said caboose, within the line of his duty and scope of his employment, the defendant, its agents and servants, knew and in the exercise of ordinary care should have known, that decedent was so in said caboose, but notwithstanding, defendant, its agents and servants, negligently failed to exercise proper care or to take any reasonable precautions for decedent's safety; that the defendant, its agents and servants, negligently ran said locomotive into and against [fol. 5] said train at a high and dangerous rate of speed and without any notice of warning to decedent; and that because and by reason of each and all of the acts of negligence herein set forth, decedent was so severely injured that he died shortly thereafter.

7th. That because of being so injured, decedent died on the 13th day of February, 1923, that at the time of his death decedent was the sole means of support and maintenance of his said widow, Jessie

Hope, and his said children, Harry R. Avitt, Ada M. Avitt, and Dorothy L. Avitt, were dependent upon him for their care, support and maintenance.

8th. That prior to his injury and death decedent was an able-bodied man, well, strong, and healthy, and could and did earn as a railway freight conductor approximately Two Hundred Fifty ($250.00) Dollars per month; and that by reason of his death damages have resulted to plaintiff, as the Special Administrator of the estate of Clarence Y. Hope, deceased, in the sum of Forty-five Thousand ($45,000.00) Dollars, which decedent would have contributed to the care, support, and maintenance of his widow, Jessie Hope, and his children, Harry R. Avitt, Ada M. Avitt, and Dorothy L. Avitt, had he not come to his untimely death as herein set forth.

For a second and further cause of action herein plaintiff alleges and shows to this court:

1st. Plaintiff re-alleges each and every allegation, matter and thing contained in paragraphs 1st, 2nd, 3rd, 4th, 5th, 6th, and 7th of his first cause of action herein.

2nd. Plaintiff alleges that after decedent was so injured, on the [fol. 6] 4th day of February, 1923, he survived and was conscious until the 13th day of February, 1923, upon which date he met his death as aforesaid; that on the 4th day of February, 1923, decedent was severely scalded and burned over all of his body, and he was severely injured about his head, neck, body, arms and legs, and he suffered great and severe pain and anguish of both mind and body from the time of being so scalded, burned, and injured to the time of his death; and that by this action plaintiff, as Special Administrator of the Estate of Clarence Y. Hope, deceased, seeks to recover for and in behalf of Jessie Hope, Harry R. Avitt, Ada M. Avitt, and Dorothy L. Avitt the sum of Fifteen Thousand ($15,000.00) Dollars as damages compensatory for the conscious pain and suffering to decedent from the time of said injuries to the time of his death.

That by reason of all the facts aforesaid, plaintiff has been injured to his damage in the sum of Sixty Thousand ($60,000.00) Dollars.

Wherefore, Plaintiff demands judgment against defendant for the sum of Sixty Thousand ($50,000,000) Dollars, together with the costs and disbursements of this action.

Davis & Michel, Plaintiff's Attorneys, 419 Metropolitan Bank Bldg., Minneapolis, Minnesota.

[fol. 7] IN DISTRICT COURT OF STEELE COUNTY

[Title omitted]

ANSWER

Answering plaintiff's complaint, defendant admits that it was and is a railway corporation organized under the laws of the States of Illinois and Iowa and that it operated and operates a line of railroad through the State of Minnesota and Iowa and other states, that it was and is a common carrier. Defendant also admits that on and previous to February 4, 1923, Clarence Y. Hope was employed by this defendant as a railway freight conductor and that on such date while in the employ of this defendant near the Village of Pershing and within the State of Iowa, he received certain injuries which resulted in his death on or about February 13th, 1923.

All other allegations in the complaint contained, the defendant denies in whole and in part.

[fol. 8] Further answering, the defendant avers that said injuries and death of plaintiff's decedent were due to his own neglect and want of care and that such neglect and want of care contributed to said injuries and death and that on and prior to February 4th, 1923, he assumed the risk of his injuries.

Further answering, this defendant specifically denies that the said plaintiff's decedent was at the time of his injuries engaged in interstate commerce. On the contrary, this defendant avers that said plaintiff's decedent was at the time he received said injuries engaged and employed by this defendant wholly in moving traffic within the State of Iowa and that at said time he was engaged wholly in intrastate commerce.

Further answering, defendant avers that plaintiff's decedent was at the time of said injury a resident of the State of Iowa and that his aforesaid employment was referable to the laws of the State of Iowa and that said contract of employment was to be performed therein and all of the duties and liabilities of the parties were at all times during the term of his said employment governed and controlled by the said laws of the State of Iowa and said contract of employment was made and performed in contemplation of the application of said laws to said contract of employment.

Further answering, this defendant avers that at the time of said injuries to said plaintiff's decedent, there were in full force and effect certain public statutes or laws of the state of Iowa duly enacted by the law-making body of said state, to-wit: the General Assembly [fol. 9] thereof, and duly approved by the Governor of said State, the same being Title XII, Chapter 8-A, Supplement to the Code of 1913, as amended by the 37th and 38th General Assemblies and hereinafter in this answer referred to as the Workmen's Compensation Law of the State of Iowa. Said Workmen's Compensation Law of the State of Iowa, as the same existed on February 4th, 1923, and for a long time prior thereto, is set forth verbatim in Exhibit A, which is hereto attached and made a part hereof.

Further answering, the defendant avers that both defendant and plaintiff's decedent, in compliance with the terms and conditions of said Workmen's Compensation Act have elected to be bound by the terms thereof and that the rights and obligations of the parties are determined by said Workmen's Compensation Law and not otherwise and that plaintiff should be entitled to recover only the damages provided in said act and not otherwise in proceedings brought thereunder.

Wherefore, defendant prays that plaintiff take nothing by this action and that defendant have judgment for its costs and disbursements.

O'Brien, Stone, Horn & Stringer, Attorneys for Defendant, 1116 Pioneer Building, St. Paul, Minnesota.

Exhibit A was a copy of the Iowa Workmen's Compensation Act, since this is printed in full at pages 91 to 140 of the Record, it is not printed here.

[fol. 10] In District Court of Steele County

[Title omitted]

Reply

Plaintiff for a Reply to the Answer of the defendant in the above entitled action alleges and shows to this Court:

Plaintiff denies each and every allegation and each and every part thereof in said Answer contained except as the same admits the allegations contained in plaintiff's Complaint.

Wherefore, Plaintiff demands judgment as prayed for in said Complaint.

Dated this 16th day of March, 1923.

Davis & Michel, Plaintiff's Attorneys, 419 Metropolitan Bank Bldg., Minneapolis, Minnesota.

[fol. 11] In District Court of Steele County

[Title omitted]

Supplemental Answer

For its supplemental answer to plaintiff's complaint the defendant avers:

At the time of the death of said deceased, Clarence Y. Hope, he was a married man and left him surviving as his sole and only dependent his Widow Jessie Hope, also known as Mrs. C. Y. Hope.

On or about March 2, 1922, the defendant above named and said Jessie Hope, also known as Mrs. C. Y. Hope, having failed to reach an agreement in regard to the compensation under said Iowa Workmen's Compensation Law, the above named defendant did notify the Industrial Commissioner of the State of Iowa of such fact and did file with said Industrial Commissioner an application for arbitration as provided by said act. The said Jessie Hope, also known [fol. 12] as Mrs. C. Y. Hope, was given due and personal notice of the filing of such application and thereafter and on or about March 9, 1923, said Jessie Hope, also known as Mrs. C. Y. Hope, duly appeared and filed her answer to the said petition for arbitration. Thereafter a committee of arbitration, as provided by such Iowa Workmen's Compensation Law, was duly appointed and the hearing before such arbitration committee duly fixed for March 20, 1923, at Chariton, Iowa, of which hearing due notice was given to all interested persons, including the said Jessie Hope, also known as Mrs. C. Y. Hope.

Pursuant to such notice said hearing was duly had before such arbitration committee on said date and at said place and after hearing the evidence adduced, said arbitration committee did on March 23, 1923, make and file its findings and decision, where it was determined—

1. That on February 4th, 1923, C. Y. Hope was in the employ of the Chicago, Rock Island and Pacific Railway Co. as a freight conductor.

2. That on February 4th, 1923, while C. Y. Hope was engaged in taking his train from Pershing, Iowa, to Chariton, Iowa, which train at the time consisted of engine and caboose only, such train was struck by a passenger train and in resulting wreck the said C. Y. Hope suffered fatal injuries.

3. That such fatal injuries suffered by the said C. Y. Hope arose out of and in the course of his employment by the Chicago, Rock Island & Pacific Railway Co.

4. That at the time of his fatal injuries the deceased was not engaged in interstate commerce.

[fol. 13] 5. That by reason of the findings set out in Paragraph 4, the case is governed by the provisions of the Iowa Workmen's Compensation Law.

6. That by reason of the findings set out in Paragraph 3, the widow of the deceased is entitled to recovery under the Iowa Workmen's Compensation Law.

7. Wherefore, the Chicago, Rock Island and Pacific Railway Co. is hereby ordered to pay Mrs. C. Y. Hope compensation under the Iowa Workmen's Compensation Law at the rate of $15.00 a week for 300 weeks, starting as of the date of death. The Chicago, Rock Island & Pacific Railway Co. is also ordered to pay the statutory medical, surgical and hospital and burial benefits and to pay the costs of this hearing.

On or about March 26, 1923, and within five days after the filing of such findings and decision, said Jessie Hope, also known as Mrs. C. Y. Hope, did file a notice of appeal to and claim for review by the Industrial Commisiosner of the State of Iowa, and thereafter and on April 24, 1923, pursuant to said notice of appeal and claim for review, said Industrial Commissioner duly notified all interested parties, including said Jessie Hope, also known as Mrs. C. Y. Hope, that review proceedings under the notice of appeal by her would occur and be heard on May 4, 1923, at 9 A. M., at the office of the Industrial Commissioner in Des Moines, Polk County, Iowa. Thereafter said Industrial Commissioner did at said time and at said place and pursuant to such notice duly proceed to hear said appeal and claim for review, at which hearing the said Jessie Hope per-
[fol. 14] sonally appeared and thereafter did on May 9, 1923, make and file his decision upon such review and appeal, whereby he did in all things affirm the decision of said arbitration committee. Said decision of said Industrial Commissioner has never been reversed, modified or set aside, but on the contrary is in full force and effect.

The defendant pleads said proceedings before said arbitration committee and said Industrial Commissioner of the State of Iowa as res adjudicata and as determinative of the rights of the plaintiff and defendant in this cause, and avers the fact to be that said proceedings are public acts, records and judicial proceedings of the State of Iowa and as such are entitled to full faith and credit in this Court under Section 1 of Article IV, of the Constitution of the United States. The defendant was at all times herein stated and is ready, able and willing to pay to said Jessie Hope, also known as Mrs. C. Y. Hope, the full amount awarded her by said findings and decision of said arbitration committee as affirmed by said Industrial Commissioner, and hereby tenders the same to her.

Wherefore, defendant prays that plaintiff take nothing by this action and that defendant have judgment for its costs and disbursements.

Due a- personal service. Admitted May 23, 1923.

O'Brien, Stone, Horn & Stringer, Attorneys for Defendant,
St. Paul, Minnesota.

[fol. 15] IN DISTRICT COURT OF STEELE COUNTY

[Title omitted]

SECOND SUPPLEMENTAL ANSWER

For its second supplemental answer herein, the defendant avers that at the time of his death said Clarence Y. Hope was a resident of Polk County, Iowa, and that at all times herein stated the District Court of Polk County, Iowa, was and still is a court of record of said state duly vested by the Constitution and laws of the State of Iowa with general jurisdiction to hear and determine causes and

controversies of every kind and nature and also with jurisdiction to administer the estates of deceased persons and to appoint administrators of such deceased persons.

Said Clarence Y. Hope died on or about February 13th, 1923, a resident of said Polk County, Iowa, leaving property therein, and [fol. 16] thereafter one E. R. Byers was duly appointed administrator of his estate by said District Court of Polk County, Iowa.

Thereafter and on or about May 14, 1923, said E. R. Byers, as administrator of the Estate of Clarence Y. Hope commenced an action as such administrator against this defendant upon the same identical cause of action set forth in the complaint herein and that said action is still pending and undetermined.

This defendant avers the fact to be that the above named plaintiff has no right or title to any cause of action against this defendant under the so-called Federal Employers' Liability Act on account of the death of said Clarence Y. Hope but that any such cause of action under said act (although the defendant denies the existence of any such cause of action), belongs to said administrator appointed by the District Court of Polk County, Iowa. Because of the facts herein stated this plaintiff has no right to prosecute this action.

Further answering, the defendant avers that on or about May 17th, 1923, Mrs. Clarence Y. Hope, also known as Jessie Hope appealed to the District Court of Lucas County, Iowa, from the findings and award of the arbitrators as affirmed by the Industrial Commissioners, as set forth in this defendant's first supplemental answer, and that thereafter said matter came duly before said Court on said appeal, and thereafter and on June 2nd, 1923, said District Court of Lucas County, Iowa, did duly enter its judgment and decree wherein and whereby it did in all things affirm said findings of [fol. 17] said arbitrators as affirmed by said Industrial Commissioner. Defendant pleads said judgment as res adjudicata and as a bar to plaintiff's alleged cause of action herein and avers the fact to be that this Court is required under the Constitution of the United States to give full faith and credit to said judgment and that a failure of this Court to give such full faith and credit will be a denial to this defendant of its constitution rights in that behalf.

Wherefore, Defendant Prays That Plaintiff Take nothing by this action and that defendant have judgment for its costs and disbursements.

Due and personal service. Admitted June 5, 1923.

Davis & Mitchel, Attorneys for Plaintiff. O'Brien, Stone, Horn & Stringer, Attorneys for Defendant, St. Paul, Minnesota.

[fol. 18] IN DISTRICT COURT OF STEELE COUNTY

[Title omitted]

Settled Case

CAPTION

It is hereby certified, that heretofore, to-wit, on the 4th day of March, 1924, at 9:00 A. M., the above entitled cause came on for trial and argument before the Honorable Fred W. Senn, District Judge, and a jury, in the Court Room, in the Court House, in the City of Owatonna, in Steele County, Minnesota.

APPEARANCES OF COUNSEL

Messrs. Davis & Michel, St. Paul, Minnesota, and Messrs. Leach & Leach, Owatonna, Minnesota, appeared for the plaintiff.

Messrs. O'Brien, Horn & Stringer, St. Paul, Minnesota, and Mr. F. A. Alexander, Owatonna, Minnesota, appeared for the defendant.

And thereupon the following proceedings were had, viz:

[fol. 19] COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Stringer: The defendant moves the court for a continuance of this case, on the following grounds:

That there are not to exceed twenty-four jurymen on the panel called for this term; of those twelve sat upon the case of Elder against the same defendant, a cause of action occurring out of the same accident as is involved in this case; that the records in the two cases are identical, except as to the measure of damages, if any; that all of the remaining jurors on the panel were present in the court room and heard all of the testimony in the Elder case, and for that reason it is improper that a jury selected from the present panel should hear the case at bar.

I take it counsel will stipulate that the record in the two cases is as I have indicated, and may the record show, if your Honor please, that the facts I have stated with respect to the panel of jurors are correct?

Mr. Davis: No, I will not, and the statement made by counsel that the entire rest of the panel were present in court during the trial I deny and there is nothing before this court to sustain it. And I desire to also say that counsel for the Railroad Company, when the Elder case was tried, asked the counsel for the plaintiff whether we expected to try the Hope case and we told him we did and our

clients would be here, and he said he would be ready to try the case. Now, we are willing to try this case either with a special venire or this same jury, and counsel can fully inquire of the jury whether or not the facts as heard in the Elder case would prejudice them or make up their minds or whether it would foreclose them from giv- [fol. 20] ing the defendant a fair trial. But I wish to state that the woman is supporting her children, working out at a dollar a day, and the only effort of the Railroad Company is to put this thing off to starve her out, and I am opposed to it as an unjust and inhuman act. And furthermore, your Honor the courts of Iowa are seeking by injunction and every other process known to deprive the woman and children of their rights. We are here and now is the time to try that case, and if this court, your Honor, feels that the present panel that is objected to by counsel is not the jury to try this case, let's have a special venire and let's end this case. We feel that counsel is not in a position to urge a continuance in this case, after having acquiesced and agreed to try it, and our witnesses and clients are here and we subpœnaed our witnesses, and if they return to Iowa we probably can never get them again, and in the discretion of the court we are perfectly willing that the court now order a special venire to try this case if he feels that this present panel—and I think that this jury should be interrogated and inquired about, and if the court feels—I don't think any of this present jury that tried this case undoubtedly made up their minds as to an issue in the case, or to say that the balance of the jury here felt that way, why that goes beyond the facts. Now, in order to give this defendant a fair trial, I am perfectly willing, if the court feels that the interest of justice demands it, that a special venire be drawn by the sheriff and by the proper officer and we precede to trial.

Mr. Stringer: I wish the record to show, however, that the defend- [fol. 21] ant did not agreed to try this case at this term, although it is admitted that counsel advised us that he expected to go to trial at this term.

Mr. Davis: Well, I think you will admit that you asked me yourself whether or not we expected to try the Hope case and I said that we did and you said you would get ready for trial.

Mr. Stringer: Yes, I will admit that, and I am ready for trial. The only reason for the request is the grounds that I have indicated.

The Court: I think the case should not be continued at this time and the motion will be denied. I want counsel to have a fair trial—to have a fair and impartial jury in this court and I think perhaps it would be proper to exclude from this jury the members of the panel who sat on the Elder case.

Mr. Davis: I think it would.

The Court: And the remainder of the panel may be called and any insufficiences supplied by the sheriff. It would be difficult at this time to draw a special venire from the box and go out and get the jurors from over the county.

Mr. Davis: Well, couldn't it be done by tomorrow morning? If counsel wants to wait, I can.

The Court: As far as the remainder of the panel are concerned, I recall that last Saturday, after the jury in the Elder case were impanelled, the remaining jurors of the panel were excused. I presume they were about the court room yesterday during the remainder of the trial, but it does not seem to the court that that should disqualify this jury from sitting on this case, even though the facts are similar.

Mr. Davis: Very well, we are ready to *precede*.

[fol. 22] The Court: The record may show that the court ordered the sheriff to return a special venire of twelve jurors to supply the deficiency upon this panel.

(Intermission while the sheriff called a special venire. Jury selected and sworn, and at 1:30 P. M. Mr. Davis made his opening statement to the jury.)

(Letters of administration marked plaintiff's exhibit 1.)

Myrtle Hanlon, called and sworn as a witness for and in behalf of the plaintiff, testified as follows:

Mr. Davis: Plaintiff offers in evidence exhibit one, being letters of administration—certified copy. I will state to the jury that these are the letters of administration and the appointment of an administration—an administrator, which under the law must be appointed to prosecute the action and be a proper party plaintiff.

Q. Miss Hanlon, where do you live?

A. Williamson, Iowa.

Q. And are you now employed by the Rock Island?

A. Yes, sir.

Q. And you were subpœnaed here by us as a witness?

A. Yes, sir.

Q. And, Mrs. Hanlon, how long have you been employed by the Rock Island?

A. Seven years.

Q. In what capacity?

A. Operator.

[fol. 23] Q. As operator at Williamson, are you familiar with the coal mine nearer Pershing yard?

A. Yes, sir.

Q. And as operator at Williamson, you may state during these years whether it has been part of your work in the carrying on of the company's business to ascertain the cars through numbers and destinations which go out of that mine at Pershing yard?

A. Yes, sir.

Q. And during these years do you know from your experience in handling the company's business whether these yards have been switched or pulled, as you call it, practically every day of the week when they are running?

A. Yes; they pull coal from the mines.

Q. And when they pull coal from the mines, they pull loaded cars?

A. Yes, sir.

Q. Mrs. Hanlon, with regard to the coal which is pulled from the yards and placed on—at Pershing yards, are there tracks known as one and two?

A. There are.

Q. On the track one, what cars are placed there?

A. West bound.

Q. That mine is west from that point?

A. Yes, sir.

Q. And those on two are billed east?

A. Yes.

Q. Now, then, do you know whether or not during all the time you have been there whether cars going into the state or out of the state are all pulled either on one or two tracks?

[fol. 24] Mr. Stringer: That is objected to as irrelevant and immaterial.

The Court: Overruled.

Mr. Stringer: Exception.

Mr. Davis:

Q. You may answer.

A. I forgot what it was now.

(Question read.)

A. Yes, they are.

Q. No distinction is made between placing cars going out of the state or into the track on track one if they are going west, is there?

A. No.

Mr. Stringer: Same objection.

The Court: Same ruling.

Mr. Davis:

Q. And with regard to this mine, were you working on Sunday, February the 4th, 1923, and did you receive from Mr. Hope, as conductor, information with regard to certain cars which had been pulled out of that mine and placed on track one or two?

A. Yes I did.

Q. And I will ask you if you know from your handling of the company's business whether or not there were two loaded cars of coal billed from the mines to St. Joseph, Missouri?

Mr. Stringer: That is objected to as no foundation laid.

The Court: Answer that yes or no, whether she knows.

Mr. Davis:

Q. I will ask you, were there two cars of loaded coal for St. Joseph, Missouri, placed on those tracks. Do you know that?

Mr. Stringer: Objected to as no foundation laid.

Mr. Davis: Do you seriously contend that those St. Joseph cars were not placed on track one?

[fol. 25] Mr. Stringer: Well, I object to the question. I think it should be proven in the regular way by the record.

Mr. Davis:

Q. Mrs. Hanlon, you brought here at the request of the Railroad Company certain records, didn't you, in the case that was tried yesterday?

A. I didn't bring them; no, sir.

Q. Well, they were brought here then?

A. Yes, sir.

Q. Records made by you?

A. Yes, sir.

Q. And you came here as a witness for the Railroad Company in the case that was tried yesterday?

A. I did.

Q. And you were subpœnaed by us and required to testify here for us as a witness in this case?

A. Yes.

Q. These records which you had are made from information conveyed by the conductor from manifests, are they?

A. Yes, sir.

Q. And who was the conductor who gave you that information on February 4th?

A. Conductor Hope.

Q. Was the conductor in charge of the switching operations at those mines that day?

A. Yes, sir.

Q. Have you these records now? I will ask you this,—in the switching of those mines, do you know what the custom and practice was of those crews, when they received orders to switch a mine, [fol. 26] whether or not they would complete the pulling out of the loaded cars out of that mine when they were required to switch the mine?

Mr. Stringer: That calls for an answer yes or no. Do you know?

A. I do not know.

Mr. Davis:

Q. Do you know from the work you did and the custom of doing the work whether or not as a rule and custom of doing the company's business you would receive information with regard to the condition of the tracks both in the forenoon and afternoon of various days?

A. Yes.

Q. And now these manifests that are received, are they received by the conductor from the mines?

A. Yes, sir.

Q. And those manifests, after being received by the conductor, do you know what his duties with those manifests is?

A. Well, he give them to us, or takes them to Chariton and mails them to us.

Q. That is in the usual handling and course of the company's business?

A. During the week he would give them to me.

Q. I say, that is in the usual handling and course of the company's business that he does that?

A. Yes, sir.

Q. And as I understand, when he would receive a manifest, for instance, cars, whether they went in or out of the state, or both, those manifests would be taken by him, if he was going to Chariton, to Chariton and then mailed by him, or under his direction, to you at Williamson?

A. Yes sir.

[fol. 27] Q. And that was part of his work to see that those manifests reached you at Williamson?

A. Yes.

Q. And it was part of the work of carrying on the business of the company, was it not?

A. Yes, sir.

Q. And did you ever receive those manifests for the list of cars that he 'phoned you that day?

A. No, I never did.

Q. Do you know what became of them?

A. I don't know, but I suppose that they burned up in his ca' oose.

Q. Well, you so testified at Des Moines that they were burned up, did you not?

A. That is what I say I think became of them.

Q. You never received them?

A. I sure didn't.

Q. And in the usual and ordinary course of handling the company's business you should receive them?

A. Yes, sir.

Q. And I will ask you this,—was it necessary for you to receive them in order to make out your bills of ladings and carry out the further transportation of those cars to their destination?

A. No; I believe he called——

Q. I say generally you would receive the manifest before you——

A. No; I would bill off the telephone.

Q. You would bill off the telephone. Were those manifests used by you on a check on your 'phone?

A. Yes.

Q. And those manifests would check up with the manifests you had made over the 'phone?

[fol. 28] A. Yes.

Mr. Stringer: I object to that as leading.

Mr. Davis:

Q. Now, Mrs. Hanlon, in the handling of this company's business did you ever receive manifests for these lists here?

A. No, I never did.

Q. And after you received the manifests which Mr. Hope or some other conductor would give to you, or send to you, what would you do with them? What would you do with the manifests?

A. I would check my telephone bills and file them away.

Q. And were they filed away as part of the records of the company in the handling of the company's business?

A. Yes, sir.

Q. Handing you exhibit 2, will you state what that is?

(List of car numbers on yellow paper marked plaintiff's exhibit 2.)

Q. Handing you plaintiff's exhibit 2, you may state what that is.

A. Well, it is the numbers and destinations of the coal he brought out at 9:30.

Q. It is the numbers and destinations of the coal he brought out of the mine at 9:30 that morning?

A. Yes, sir.

Q. I will ask you if in that exhibit one there is listed two cars, one L. & N. No. 62565, destined for St. Joseph, Missouri, and one K. C. S. No. 27783, destined for St. Joseph, Missouri?

A. Yes, sir.

Q. And do you know from the handling of the company's business and the information received by those, that those two cars were [fol. 29] two loaded cars for St. Joseph, Missouri?

Mr. Stringer: That is objected to as calling for the conclusion of the witness.

The Court: Objection sustained.

Mr. Davis: Exception.

Q. Now, do you know, where were those two cars billed to that I just read to you? Where did you bill them to?

A. St. Joseph, Missouri.

Q. And do you know from the handling of the company's business whether or not they went to St. Joseph, Missouri?

Mr. Stringer: Same objection,—calling for the conclusion of the witness.

The Court: Objection sustained.

Mr. Davis:

Q. Well, did you receive any reports back? Don't you receive reports back as to where cars are billed?

A. No.

Q. You billed them for St. Joseph, Missouri?

A. I expect, yes; yes, sir.

Q. And when you billed them, after you billed them, who were they turned over to?

Mr. Stringer: What do you mean, the cars?
Mr. Davis: The billings.

A. Well, the bills are given to the conductor that picks them up.
Q. Are the bills given to him before he picks them up?
A. No, sir.
Q. I mean the train that takes them out of Pershing yard, does the conductor who takes those cars out of Pershing yards have these bills before he pulls them out, or afterwards?
[fol. 30] A. He gets the bills at Williamson and goes down there and picks them up.
Q. And you people deliver the bills of lading or the shipping bills to him?
A. The bills; yes, sir.
Q. And you delivered to some conductor bills for two cars to St. Joseph. Did you ever read the numbers?
A. I couldn't say whether I did it or not.
Q. You know they were delivered in the course of the company's business?
A. I sup-ose they were, because I billed them.
Q. And I think that is all.

Mr. Davis: We offer exhibit two in evidence.

Cross-examination.

Mr. Stringer:

Q. As I understand you, the cars shown on the plaintiff's exhibit two were the cars that were brought in on the first track at 9:30 of that day?
A. Yes, sir.
Q. And this exhibit shows the correct number of the cars and the character of the destinations to which they were billed?
A. Yes, sir.
Q. Now, later in the day the conductor again 'phoned you, did he not?
A. 11:50.
Q. 11:50 that morning?
A. Yes, sir.
Q. And gave you a list of cars which he had brought in on the second track?
A. He did.

(Three yellow sheets with car numbers on them marked defendant's Exhibit "A.")

[fol. 31] Q. I show you defendant's Exhibit "A" and ask you if that is a list of the cars which the Conductor Hope brought in on the second track?
A. Yes, sir.
Q. And how did you get the information?
A. Over the telephone.

Q. From him?
A. At Pershing; yes, sir.
Q. Is that exhibit in your own handwriting?
A. It is.
Q. And does that exhibit show a correct list of the cars and the numbers of the cars and the destinations as given to you by him over the 'phone that day?
A. Yes, sir.
Q. The first exhibit, or the first number on this exhibit, is C 99271, and after it is the word "Allerton." Was that car later billed by you to Allerton?
A. Yes, sir.
Q. And where is Allerton?
A. Iowa.
Q. In the state of Iowa?
A. Yes, sir.
Q. The next car is C 100221, and after it V JCT. What does that mean?
A. Valley Junction.
Q. And where is Valley Junction located?
A. Iowa.
Q. Under, in the same column as appears Allerton and Valley Junction, are dashes after the remaining cars on this list. Where were those cars consigned to?
A. Well, that is all Valley Junction.
Q. Where you have those dashes under the word "Valley June-
[fol. 32] tion" it is intended to be a ditto mark?
A. Yes, sir.
Q. And all refers to Valley Junction, Iowa?
A. Yes, it is.
Q. Were there any cars brought in on the second drag which were later billed by you outside of the state of Iowa?
A. No, sir; they were all billed to Iowa.
Q. On plaintiff's Exhibit Two, in the last column, appears the word, "V Jct." What does that mean?
A. Valley Junction.
Q. That car was consigned by you to Valley Junction?
A. Yes, sir.
Q. In the state of Iowa?
A. Yes, sir.
Q. Under that there is a line referring to the next car?
A. That is ditto.
Q. That means ditto. That was Valley Junction also then. After the third car is the word "Ar." What does that mean?
A. Allerton, Iowa.
Q. After the next three cars, under that same column, are dashes. What does that mean?
A. That is ditto.
Q. All those were billed to Allerton, Iowa?
A. Yes, sir.

Q. After the next car is the word "V Jct." I take it that means Valley Junction?
A. Yes, sir.

Mr. Stringer: I offer in evidence the other exhibit.
[fol. 33] Mr. Davis: No objection.

Mr. Stringer:

Q. As I understand you, you never got the billing on these at all?
A. I never got the manifests.
Q. Or the manifests, I mean?
A. No, sir.
Q. And you made the billing from these two exhibits, plaintiff's Exhibit Two and defendant's Exhibit "A"?
A. I did.
Q. I guess that is all.

Redirect examination.

Mr. Davis:

Q. How long before Mr. Hope was injured in this wreck did you receive that last message from him?
A. I received it at 11:50.
Q. And he was injured about 12:17, was he not?
A. I think so. It was shortly after twelve o'clock.
Q. And there is a booth or place there or 'phone furnished by the company for 'phoning this information?
A. Yes.
Q. And this Pershing yards is listed as a station on the Rock Island, is it not?
A. Why, I suppose so. I never thought——
Q. What is its number and initials?
A. O. D. 27.
Q. O. D. 27. And it is a point at which orders are received by train men in operation of trains, is it not?
A. Yes, sir.
[fol. 34] Q. And those orders are received and transmitted by whom to the conductors at that point?
A. By the train dispatcher.
Q. And do the conductors in working or entering upon the main line have to get orders from that train dispatcher before entering the main line?
A. Yes, sir.
Q. And at that point this is a place where orders are received, giving them authority or the right to enter upon the main line?
A. Received by the conductors.
Q. And without such authority they cannot enter the main line, can they?
A. No, sir.
Q. And do thoses orders, do you know, from your experience there,

whether they are given with reference to the arrival or departure of other trains, the orders to go upon the track?

A. Yes; they usually do.

Q. And the right or privilege of allowing a conductor at that point to go upon the main line is governed by the arrival and departure of other trains?

A. Yes, sir.

Mr. Stringer: That is objected to as irrelevant ad immaterial, not within the issues in this case.

The Court: Overruled.

Mr. Davis:

Q. And is that the main line of the Rock Island?

A. You mean running through there?

Q. Yes.

A. It is; St. Paul to Kansas City.

Q. That is, from St. Paul, Minnesota, to Kansas City, Missouri?

[fol. 35] A. Yes, sir.

Q. And all freight and passenger trains running from St. Paul, Minnesota, to Kansas City, Missouri, pass on that main line,—is that correct?

A. Well, I don't know.

Q. Over the Rock Island line?

A. Well, I don't suppose; no, they don't all run through there.

Q. The Kansas City passenger train does pass on that?

A. Yes.

Q. On the Rock Island, what train is that known as?

A. Well, there is four first-class, you mean?

Q. Well, the one that ran into this caboose?

A. Well, 69.

Q. 69, is a train running from St. Paul, Minnesota, to Kansas City, Missouri,—is that correct?

A. Yes, sir.

Q. And runs over this main line past Pershing siding?

A. Yes, sir.

Q. And from there west into Chariton?

A. Yes.

Q. I think that is all.

Mr. Stringer: That is all.

Sam Woods, called and sworn as a witness for and in behalf of the plaintiff, testified as follows:

Mr. Davis:

Q. State your full name.

A. Sam Woods.

[fol. 36] Q. You were the engineer of the extra work train or switch train that day that Mr. Hope was injured?

A. I was.
Q. Who was your conductor?
A. C. Y. Hope.
Q. As such conductor did he have charge of the movement of your engine?
A. He did.
Q. You may state to the jury whether or not you worked under instructions from him as to what you did and where you went?
A. We did.
Q. And on this day in question you were switching some mines, were you?
A. Yes, sir.
Q. And you, in switching those mines, you would haul different loaded cars from the mines and take them up to Pershing yards?
A. Yes, sir.
Q. And there they would be placed upon a side track, the storage track?
A. Yes, sir.
Q. And this was as Mrs. Hanlon testified, tracks one and two?
A. Yes, sir.
Q. The west bound placed on one and the east bound on two?
A. Yes, sir.
Q. Now, Mr. Woods, after having switched there and around about 12.30, you may state whether or not an order was given to you, or delivered to you, giving you permission to go onto the main line track to go to Chariton?
A. It was.
[fol. 37] Q. Will you produce that order?

(Train order marked defendant's Exhibit Three).

Q. Now, handing you exhibit, plaintiff's Exhibit Three, you may look at it and state if that is an order delivered to you?
A. It is.
Q. Giving you authority to go upon the main line?
A. It is.
Q. By whom was it delivered to you?
A. C. W. Hope.
Q. At the time he would receive that order, would he also receive a copy similar to it for his own use?
A. Well, he should; yes.
Q. He would deliver one to you and retain one himself?
A. Yes, sir.
Q. And that would be the authority for him to enter upon the main line?
A. Yes, sir.

Mr. Davis: We offer in evidence Exhibit Three.
Mr. Stringer: No objection.

Mr. Davis: That reads, ladies and gentlemen, "12.09 p. m., C. W. Hope." That represents Conductor C. W. Hope?
A. It does.

Mr. Davis: "No. 912 engine unknown and all eastward extras wait at Chariton until 1.30 p. m."

Q. What would that mean? Would that mean that all trains going east would not leave Chariton until 1.30?

A. It would.

[fol. 38] Q. No matter where they came from, whether inside or out the state?

Mr. Stringer: Objected to as irrelevant and immaterial.

The Court: Overruled.

(No answer.)

Mr. Davis:

Q. Now, then, the latter part of the order, "All first-class trains due Pershing before 12.10 p. m. have arrived or left." You may state to the jury whether that would mean and be information to you and Mr. Hope that you had a clearance on that track and that there were no trains approaching from the east?

A. It would.

Q. And would that part of it, "All trains due * * * arrived or left," have reference to both trains to go out of the state or trains in the state, or both?

Mr. Stringer: Objected to as irrelevant and immaterial and not within the issues.

The Court: It is proper to inquire about the trains. I think it immaterial whether they were out of the state or in the state.

Mr. Davis:

Q. Would it apply to all trains from the east?

A. It would.

Q. And were there some trains from the east that did go out of the state?

Mr. Stringer: Objected to as irrelevant and immaterial.

The Court: He may answer.

Mr. Davis:

Q. You may answer.

A. Yes.

Q. Yes. And what train ran into you?

A. No. 69.

Q. What train was that?

[fol. 39] A. It was the Kansas City—St. Paul train.

Q. Passenger train?

A. Yes, sir.

Q. From St. Paul, Minnesota, to Kansas City, Missouri?

A. Yes, sir.

Q. And did this order, Exhibit Three, given you a preferential right of way over that or any other train from the east?

Mr. Stringer: Objected to as calling for the conclusion of the witness.

The Court: I think it is proper for the witness to explain the order.

Mr. Davis: Yes.

Mr. Stringer: He has explained it two or three times.

Mr. Davis:

Q. I will ask it in this way, Mr. Woods, when you received that order, you may tell the jury whether that gave you any preference as to entering the main line?

A. It did.

Q. And what right did that give you, after you received that order?

A. It gave me the right to move from Pershing to Chariton.

Q. Yes, over the main line?

A. Yes, sir.

Q. And you may tell whether or not in giving you the right to move from Pershing to Chariton, whether or not any other train, no matter what train it was, would have any right to use that track while you were on the way?

Mr. Sringer: That is objected to as calling for a conclusion and irrelevant.

The Court: Overruled.

[fol. 40] Mr. Davis:

Q. You may answer.

A. It just gave you the right to use that track from there to Chariton; east bound train couldn't come against you.

Q. What do you mean, east bound train couldn't come against you?

A. Well, couldn't leave Chariton until that order was dead by limitation of time or place.

Q. What about west bound trains after you got that order?

A. West bound trains?

Q. Yes, coming to Chariton?

A. Well, the dispatcher takes care of that part of it himself.

Q. I understand. In what way does he take care of it?

A. He sees when we clear at Chariton or the—or the O. S. is in there.

Q. What do you mean by the O. S. is in there?

A. Well, the operator notifies the dispatcher that extra 1574 is there.

Q. At Chariton?

A. Yes.

Q. And now, then, until he is notified of that, what about trains coming from the east, coming onto that main line between Pershing siding and Chariton, after you receive that main order, what do they——

A. Well, it was in the yard limit where it struck and the freight

trains would have to come through there under control, but the passenger trains doesn't.

Q. Now, when this passenger train came, did you have any notice or warning it was coming?

A. No, sir.

[fol. 41] Q. And the collision ensued?

A. Yes, sir.

Q. And Mr. Hope was injured?

A. Yes, sir.

Q. Did you see him immediately after he was injured?

A. No, sir.

Q. I think that is all.

The Court: What direction were you traveling from Pershing to Chariton

A. West.

Mr. Davis:

Q. And you were still in the Pershing yard at the time this collision occurred?

A. We were inside the yard limits; yes, sir.

Q. That is all.

Cross-examination.

Mr. Stringer:

Q. At the time the collision occurred you had no train attached to your engine?

A. Nothing but the engine and caboose.

Q. Nothing but the engine and caboose; and carrying no traffic?

A. No, sir.

Q. At the time you went to work that mine you received an order, authorizing you to do it, did you not?

A. Yes, sir.

Q. Have you got that order with you?

A. I have.

(Train order marked defendant's Exhibit "B").

Q. I show you defendant's Exhibit "B." Is that the order that you went to work on in the morning?

[fol. 42] A. It is.

Mr. Stringer: I offer it in evidence.

Mr. Davis: No objection.

Mr. Stringer: We will read it into the record, "Train order J 10. Des Moines, Feb. 4, 1923. To C. & E."

Q. I suppose that means conductor and engineer, don't it?

A. It is.

Q. "Engine 1491 and engine 1574, at Chariton, 6:50 a. m. Engine 1491 and engine 1574 work 7:30 a. m. until 1:00 p. m. between Chariton and Williamson, protecting against each other and against second-class trains. All extras west wait at Williamson until 1:00 p. m. All extras east wait at Chariton until 1:00 p. m. All extras east complete time 6:50 a. m. By B. F. Y. Montgomery Operator."

Q. Then, as I understand you, that last exhibit I offered you, number "B," was the order you went to work on in the morning?

A. It did; it was.

Q. And that order expired by limitation of time at 1:00 p. m.?

A. It did.

Q. And after you got back to—where was it you were going when the accident occurred?

A. Chariton.

Q. After you got back to Chariton, you couldn't move out of Chariton until you got another order?

A. No, sir.

Q. And you have no idea what kind of an order you would get?

A. No, sir.

[fol. 43] Q. Or where you would be ordered to go?

A. No.

Q. You might have been ordered down to Melcher?

A. We might have; yes, sir.

Q. It very often happens that in the afternoon—in the morning you will work at one place and in the afternoon be ordered somewhere else?

A. Yes, sir, we have been.

Q. And at the time you were going home you had no idea where you were going to be that afternoon?

A. We did not.

Q. Or what work you were going to do?

A. No, sir.

Q. You never had received an order for the afternoon work?

A. No, sir.

Q. That is all.

Redirect examination.

Mr. Davis:

Q. So far as this order is concerned, this is merely, Exhibit "B," an order giving you the right to go upon the main line track?

Mr. Stringer: Objected to as leading—very leading.

Mr. Davis: Well, I will ask the court the privilege of leading. I think in the interest of justice that we should be allowed to lead this witness, an employee of the company, in order to give this jury the truth in the operation of this train.

The Court: I think we can go by the regular rules.

[fol. 44] Mr. Davis:

Q. In regard to this order, I will ask you to state whether or not it had anything to do with work you were going to do at the mines?

A. It did not.

Q. And so far as any work you were going to do at the mines, this order had nothing to do?

Mr. Stringer: Objected to as very leading.

The Court: Objection sustained.

Mr. Davis:

Q. Did this have anything to do with your work outside of giving you the right to use the main line?

A. No, sir.

Q. And on this order your time did not expire, as I see it, until one o'clock?

A. It did not.

Q. And your wreck occurred at what time?

A. Along about 12:17.

Q. Along about 12:17. And you had quit your work, as I understand it, under this order, at the time your accident occurred?

A. That was the work order; yes, sir.

Q. And the only work order delivered to you?

A. Yes, sir.

Q. Now, in switching these mines at that time, I will ask you if you know, from your experience, whether or not it frequently occurred that you would switch those mines, working into noon and then go to Chariton and return in the afternoon?

A. We had—we have worked the mines in the morning and go some place else in the afternoon, as the dispatcher saw fit to direct.

Q. And haven't you also gone back to the mine?

[fol. 45] A. We have; yes, sir.

Q. And which do you do the most frequently, go back to the mine when you started in the morning, Mr. Woods?

Mr. Stringer: That is objected to as immaterial.

The Court: Overruled.

Mr. Davis:

Q. Just answer the question.

A. It was according to the way the work was at the mine, or what he wanted us to do in the afternoon.

Q. I understand, but I say now in the last month you would start in to switch that mine in the morning, how frequently would you say you did not work in the afternoons, if there was work to do there and were ordered other places?

A. Well, it wasn't very often.

Q. No; the general practice was to switch the mines, if you started in the forenoon, both forenoon and afternoon, wasn't it? That is true, isn't it?

Mr. Stringer: That is objected to as very leading.
The Court: The question is leading.
Mr. Davis: I know it is, your Honor. It seems to me with an employee that we certainly should have that right to lead. I don't know how it is——
The Court: I think he will answer the questions that he is asked.

A. Yes; we most generally go back and switch, if we had any work to do there.

Mr. Davis:

Q. You do know that all the cars at that mine hadn't been pulled out that day, do you?

[fol. 46] Mr. Stringer: Objected to as leading.
Mr. Davis: Withdrawn.

Q. Do you know whether any cars loaded that hadn't been pulled out at the mine?
A. Yes.
Q. You may tell the jury whether it is customary when you pull the mines to pull all the loaded cars out and place them on the tracks at Pershing siding?
A. Yes.
Q. And you hadn't pulled them all out that day, had you?
A. No.
Q. And you were going in at that time to get water for your engine, weren't you?

Mr. Stringer: That is objected to as leading.

Mr. Davis:

Q. Well, were you going in to get water?

Mr. Stringer: Same objection.
The Court: Overruled.

Mr. Davis:

Q. You may answer.
A. Yes, sir, we were going in to get water and dinner.
Q. And unless, if this mine hadn't been entirely switched, I will ask you whether or not it is a fact that unless you got orders to go elsewhere it would be the duty of Mr. Hope to complete the switching of that mine? Is that a fact?
A. Unless we got different orders to go some place to work?
Q. Yes.
A. Yes, it would have been his duty to have cleaned up the work at the mine.
Q. Now, you didn't get any order to go anywhere else, did you?
[fol. 47] A. No.
Q. And the only order after you got to Chariton that you would

have to get in order to go back and complete switching the mines would be an order to go on the main line to Pershing siding?

Mr. Stringer: Objected to as very leading.
The Court: Objection sustained.

Mr. Davis:

Q. Now, what order would you have to get, in order to go back to Pershing siding?
A. We would have to get another running order.
Q. Would that running order have anything or say anything with regard to what work you would do at the mine?
A. No, sir.
Q. I think that is all.

Recross-examination.

Mr. Stringer:

Q. You couldn't have moved out of Chariton without getting a switching order, as you spoke of?
A. No, sir.
Q. Well, then, your movements were wholly under the control of the operator?
A. Under the control of the dispatcher.
Q. The dispatcher. And if he had wanted to send you back in the afternoon to pull any more cars from the mines, he would have had to send you an order to that effect?
A. He would have had to give us running orders from Chariton to the mine.
Q. And you couldn't move out of Chariton until you got such an order?
A. No.
[fol. 48] Q. In fact, you couldn't move anywhere until you got such an order?
A. No, sir.
Q. And that order would tell you where to go?
A. It would.
Q. That is all.

Re-redirect examination.

Mr. Davis:

Q. And it wouldn't tell you what to do when you got there, would it?
A. Where do you mean, at the mine:
Q. Yes.
A. It wouldn't tell me; no.
Q. And the order would be a similar order to this white order, would it?

Mr. Stringer: That is objected to as leading.

Mr. Davis:

Q. I will ask you this, would the order that you received from the dispatcher, if you were to go back to the mine, be an order giving you the right of way to go to Pershing?

A. Yes, sir; it would give you the use of the track from Chariton to there.

Q. And you receive- no order at any time that day and know of no order not—telling you not to finish switching the mines, did you?

A. No; I never received no order from the time——

Q. Yes. That is all.

The Court: Are you satisfied to have the witness take the exhibits, the train orders?

Mr. Davis: Yes, your Honor. We have copies of them from the other trial.

[fol. 49] Fred A. Elder, called and sworn as a witness for the plaintiff, testified as follows:

Mr. Davis:

Q. State your full name.

A. Fred A. Elder.

Q. And, Mr. Elder, were you formerly employed by the Rock Island system?

A. Yes, sir.

Q. And in what capacity?

A. As brakeman.

Q. Were you employed with them on February 4th, 1923?

A. Yes, sir.

Q. On that day what were you working at?

A. Switching the mines.

Q. Where were those mines?

A. Located between Chariton and Williamson.

Q. Were you injured in the wreck?

A. Yes, sir.

Q. And are still suffering from it?

A. Yes, sir.

Mr. Stringer: Objected to as irrelevant and immaterial.

Mr. Davis: Only as to his experience, Mr. Stringer.

Q. Mr. Elder, who was the conductor in charge of that operation?

A. C. Y. Hope.

Q. Did you know C. Y. Hope in his lifetime?

A. Yes, sir; about nine years.

Q. And in doing this work in switching the mines, for how long a time before this had you been working at that work of switching the mines?

A. Well, near four years.

[fol. 50] Q. And during that time, do you know from your ex-

perience and the method and manner of the company's handling the work how those mines were switched?

A. Yes, sir.

Q. I wish you would tell the jury, if you can, if you received orders to switch the mine, what would be done by your crew after receiving the order with regard to switching the mine.

A. Well, we would pull the loads all out and put the empties in before we would figure we was finished.

Q. Now, then, was the custom in switching those mines to pull out all the loads when you were ordered to switch the mine, as near as you could, to wind up this work, to complete this work?

A. Yes, sir.

Q. And did you have orders that day to switch this mine?

A. Yes, sir.

Q. And had you completed the switching of the mine at the time of this injury?

A. No sir; we had not.

Q. But had you completed this work?

A. No, sir.

Q. And will you tell the jury whether or not there were other cars in the mines to be switched?

A. Yes; there was cars in there and had to take cars back in—empties.

Q. You were subpœnaed here by the plaintiff to testify in this case, I think?

A. Yes, sir.

Q. And when were you subpœnaed?

A. Yesterday, I believe it was.

Q. And you are enjoined, I believe, by some court in the state [fol. 51] of Iowa from testifying in this case?

Mr. Davis: It appears in this action that pursuant to an order issued out of the District Court of Lucas County, Iowa, a copy of which said order is herein offered as a part of this motion, that the witness, Fred Elder, has been enjoined from testifying in the present case. It also appears that such order has been set aside by the District Court of Iowa and that an appeal has been taken by the defendant Railroad Company to the Supreme Court of Iowa and that a stay has been issued by the District Court of Iowa preventing the witness from testifying pending the determination of the appeal. The witness Elder has been subpœnaed by the plaintiff in this case, with a subpœna which we offer in evidence and make a part of this motion, and has been paid his mileage and one day's witness fees for attendance, and is now here in court in pursuance of and in response to such subpœna and has been sworn as a witness. The order upon which it is attempted to prevent the witness from testifying is so pending before the Circuit Court of Appeals of the United States for this Eighth Circuit, and we now ask the court to direct the witness Elder that in the opinion of the court the order made by the District Court of Iowa is void and directing the witness Elder to proceed and testify in this case under the subpœna served upon

him and because of the fact that this court has jurisdiction of the subject-matter and the parties to this action. And further, first, upon the ground that a subpœna was duly issued out of this court [fol. 52] as hereinbefore set forth and is now in evidence; and, second, upon the ground that the order issued out of the District Court for Lucas County, Iowa, is void and of no force and effect.

The Court: The court holds in this case that it has jurisdiction of the subject-matter and that the order of the District Court of Lucas County, Iowa, assumes to take from this court jurisdiction of the case and that it is void. The witness, Fred A. Elder, is under a subpœna of this court and is here in court pursuant to subpœna issued out of this jurisdiction and will be required to testify pursuant to and under such process.

Mr. Davis:

Q. Mr. Elder, you have been ordered not to testify in this case by an order from Iowa?

A. Yes, sir.

Q. I will ask you if you want to return to Iowa when you are through here testifying?

Mr. Stringer: Objected to as immaterial and irrelevant.

A. Yes, sir.

Mr. Davis: Now, if it please the court, we will ask the court to direct the witness, Fred Elder, to testify in this case on the showing we have made of subpœnaing him.

The Court: The witness, Fred A. Elder, will testify under the subpœna and process issued out of this court in this case.

Mr. Davis:

Q. Mr. Elder, on the day in question, who had charge of your crew?

A. C. Y. Hope.

Q. And under whose direction did you at all times work?

A. C. Y. Hope.

[fol. 53] Q. In the movement of cars and placing them upon tracks going upon main line tracks, or going from place to place, who gave you the orders and directions in regard to those matters?

A. The Conductor Hope would give them to me and the dispatcher to him.

Q. Had you received your orders from him?

A. Yes, sir; in regard to our work.

Q. And he was the man in charge of this engine and train?

A. Yes, sir.

Q. Now, when you were at the mines that morning, you may tell the jury whether or not you pulled out any cars from those mines?

A. Yes, sir; from number two mine we pulled eleven, got them to the main line. They were St. Joe, as I remember, four Allerton and, I think, five Valley Junction.

Q. There were two cars that you placed on track one for St. Joseph, Missouri?

A. Yes, sir.

Q. After doing that, did you pull some other cars out of the mine?

A. Yes, sir; from number three mine.

Q. And where did you place those?

A. We put eight on number two track and one Allerton on number one track.

Q. Now, did you do that work under the directions of Hope?

A. Yes, sir.

Q. Now, then, in handling this work, you may tell the jury whether or not you received manifests, showing initials and numbers of a car and its place of destination.

A. Yes, sir; at the mines.

[fol. 54] Q. And are those delivered to the conductor in charge?

A. The conductor in charge; yes, sir.

Q. Do you know from your experience and the number of years you worked there the custom and practice of handling these manifests by the conductor and what he does with them?

A. Yes, sir.

Q. What does he do with them?

A. He makes his whole report from the manifests.

Q. What does he do with the manifests?

A. Well, when they are—get to the main line and go to Williamson, when we first get to the main line, he would 'phone it in to the operator at Williamson; when we go through, why he would deliver the manifests.

Q. Is that part of his duty to deliver those manifests?

A. Yes, sir.

Q. And when you would go to Chariton he would—how would he transport them to the agent at Williamson?

A. He would mail them back that evening on No. 70.

Q. And was that part of his duty to forward these manifests to the agent at Williamson?

A. Yes, sir.

Q. And those manifests which he would forward, would they tell the cars placed on tracks one and two?

A. Yes, sir.

Q. Both cars going out of the state, as well as cars within the state?

A. Yes, sir.

[fol. 55] Q. If this wreck had not occurred and he delivered the manifests to the cars you handled that day, would there be included in them the two St. Joseph cars?

A. Yes, sir.

Mr. Stringer: Objected to as incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Davis:

Q. And where did you last see those manifests?

A. They were in the caboose in the train book.

Q. And was the caboose destroyed?

A. It evidently was. All I saw is the springs and a few other things of it.

Q. Was it fired by the—after the collision——

A. Yes, sir, it burned up.

Q. Now, then, those manifests, the last you saw was when you—on your way into Chariton, in the possession of the conductor?

A. They were in the conductor's wheel report—in his train book we call it.

Q. And you don't know at any time that he had mailed them or delivered them to Williamson of course?

A. No chance to mail them.

Q. Now, at Pershing siding, you may state to the jury whether or not there is a telephone station.

A. Yes, sir.

Q. And you may tell the jury whether or not the conductor received orders at that station with reference to the use of the main line.

A. Yes, sir, he did.

Q. And without an order from the dispatcher for the use of the main line, can the conductor take a train onto the main line?

[fol. 56] A. No, sir; not without other protection.

Q. Now, shortly before you left for Chariton, you may tell the jury whether or not you received any orders from Conductor Hope as switching the St. Joseph cars up the track on—did you receive orders from Mr. Hope to push these cars up on track one?

A. Yes, sir.

Mr. Stringer: Objected to as extremely leading and calling for the conclusion of the witness.

Mr. Davis:

Q. Tell the jury then what Hope told you to do with reference to these St. Joseph cars on track one?

Mr. Stringer: That is objected to as immaterial and hearsay.

The Court: Overruled.

A. He told us when we came out from number three mine to shove the Allerton cars against them in the clear about five or six car lengths so as to switch the train in the afternoon without shoving——

Mr. Stringer: I move to strike out the answer as hearsay, and I object to that last question.

Mr. Davis: It is an instruction from the course of business from the conductor.

The Court: The last question wasn't answered as I recall it. It came in such quick succession that I didn't get it myself.

Mr. Davis: Well, I think the last question has been answered and I started to ask a part of a question and stopped.

(Last question read.)

Q. Well, state then again what orders Mr. Hope gave you with regard to those cars on track one and if he said anything with regard to coming back and handling them after dinner.

[fol. 57] Mr. Stringer: I object to that part of the question,—coming back after dinner,—as hearsay. That isn't an order; that's a recital.

Mr. Davis:

Q. I am asking you to say what orders he gave you.

Mr. Stringer: Well, he did testify.

Mr. Davis:

Q. Will you now state again what answer he gave you with reference to those cars?

Mr. Stringer: I object to that as repetition.
The Court: Overruled.

Mr. Davis:

Q. Go ahead.
A. He told us when we came out to shove number one to the clear about five or six car lengths, so as to give us room to switch our next——

Mr. Stringer: I move to exclude the rest of that answer.
The Court: Motion denied.

Mr. Davis:

Q. Finish your answer.
A. Give us room to switch our next train when we came back after dinner, so we would not have to shove that train until night when we finished.
Q. Did Mr. Hope state that to you?

Mr. Stringer: Counsel didn't give me an opportunity, for the purposes of the record, if it please the court, for the purpose of the record I move to exclude the latter portion of that answer which tell what they were going to do in the afternoon.
The Court: Motion denied.

Mr. Davis:

Q. Now, then, Mr. Elder, after you received that order, did you—were those cars shoved back on track one?
A. We shoved them down to five or six car lengths.

Q. On track one?

[fol. 58] A. On track one.

Q. When those cars would be taken from track one, where would they be placed with reference to the east or west end of it?

A. We would put them clear on the west end.

Q. That is, down to the west end of the main line?

A. Yes, sir.

Q. And at that time they were placed there in order to set the brakes on the St. Joseph cars—and did you set the brakes on the St. Joseph cars?

A. I set the brakes on the three loaded cars, the first loaded one was Allerton and the next two were St. Joe.

Q. Was that the last work that Conductor Hope's crew did with reference——

A. That was the last thing we ever did.

Q. And after that did you uncouple from this string and couple your engine to a caboose?

A. We uncoupled our engine and went and got our caboose.

Q. Well, you uncoupled your engine and got your caboose. Did you know where Mr. Hope was?

A. He was getting our orders and phoning in the manifests.

Q. Was in the telephone booth?

A. Yes, sir.

Q. Where did Mr. Hope get on the train?

A. Just as we was going through the crossing over onto the main line.

Q. Now, then, when you went in there, do you know what you went into Chariton for?

A. We went in for water and our lunch.

[fol. 59] Q. Do you know what you went in for?

A. Yes, sir.

Q. What for?

A. Went in for lunch and water.

Mr. Stringer: Objection to as calling for the conclusion of the witness.

The Court: Overruled.

Mr. Davis:

Q. What was your answer?

A. We went in for lunch and water.

Q. Do you know whether or not from working about the engine that the engine had to have water?

A. Yes, sir.

Q. Could you get any water there at the mines?

A. No, sir; there ain't no water at the mines.

Q. Where were you to get water?

A. Either at Chariton or Williamson.

Q. And you know from any orders and directions from Hope whether or not you had to go back to those mines after dinner?

Mr. Stringer: Objected to as calling for the conclusion of the witness.

Mr. Davis:

Q. Answer that by yes or no.

The Court: Overruled.

Mr. Davis:

Q. You may answer.
A. I didn't get the question.
Q. Did you receive and get orders from Mr. Hope or directions as to where you were going after dinner?
A. Yes, sir.

Mr. Stringer: Objected to as calling for the conclusion of the witness.

Mr. Davis:

Q. Tell the jury what directions Mr. Hope gave you with regard to that.
A. We were going back to the mines.

[fol. 60] Mr. Stringer: Objected to as hearsay.
The Court: Overruled.

Mr. Davis:

Q. To what mines?
A. To number two and three.
Q. Do you know from the custom of doing work there, when you received orders to switch a mine, whether or not you would complete the switching of the mine, as a rule?
A. We generally worked until we completed our work.
Q. And did you receive any orders after you went to the mines to switch it not to switch the mines?
A. No, sir.
Q. A wreck occurred? A wreck occurred?
A. Yes, sir.
Q. You were rendered unconscious, I think?
A. Yes, sir.
Q. So you don't know what became of Mr. Hope?
A. No, sir.
Q. I think that is all.

Cross-examination.

Mr. Stringer:

Q. At the time of this wreck you had a lone engine and a caboose only?
A. Yes, sir.

Q. While you were shoving those cars on num-
Q. That was he was—when I say 'phoning in manifests?
A. Yes, sir.
Q. That was he was—when I say 'phoning in the manifests—I mean 'phoning in the substance of what was on the manifests.
[fol. 61] A. To the operator in Chariton.
Q. And that was the cars that he was 'phoning in at that time were the cars brought in on the second drag?
A. Yes, sir.
Q. Because he at that time already phoned those on the first drag some two hours before?
A. Well, phoned them in if we did.
Q. He always phoned them in as soon as he got up there?
A. Yes.
Q. That is all.

Mr. Davis: That is all.
Mr. Davis: Now, might it be stipulated here, as it was in the other case, that Mr. Hope was injured, your Honor, in the employ of the detendant company and that his injury was proximately caused by reason of the negligence of the company in running a passenger train into the engine and caboose under the charge of Conductor Hope and that no claim is here made of the assumption of risk or contributory negligence?
Mr. Stringer: Yes, that is satisfactory.
Mr. Davis: And that this injury occurred on the 4th day of February, 1923, and that later Mr. Hope died from injuries received at that time?
Mr. Stringer: Well, I suppose he did. There is no doubt about it, is there?
Mr. Davis: No; I simply say that to save time.
Mr. Stringer: Well, I don't claim that he died from anything else.

[fol. 62] IDA PRICE, called and sworn as a witness for and in behalf of the plaintiff, testified as follows:

Mr. Davis:

Q. Miss Price, where do you live?
A. Russel, Iowa.
Q. And are you a nurse?
A. Yes, sir.
Q. And you may state to the jury whether or not as a nurse you attended Mr. C. Y. Hope after his injury?
A. Yes.
Q. Where?
A. At the Yokum and Yokum hospital in Chariton.
Q. Do you know where he was when he died?
A. At the Yokum and Yokum hospital, Chariton.
Q. Did you see him after his death?

A. Yes; I was present with him when he died.
Q. You were present with him when he died?
A. I was present with him when he died.
Q. When was he brought in there?
A. Well, I came to him Sunday evening about seven o'clock.
Q. Now, at that time I wish you would tell the jury his condition. Just turn and tell the jury the condition of Mr. Hope at that time as to injuries, burns and as to his general condition.
A. He was unconscious and had second and third degree burns extending from the waist line to the tip of his great toe and a head injury and a bruise on the side.
Q. Now with regard to the second and third degree burns, I wish you would explain to the jury—a first degree burn is a slight burn?
[fol. 63] A. Yes.
Q. And second degree is deeper?
A. Deeper.
Q. And a third degree is a burn through the entire skin?
A. Extend clear through the tissues.
Q. Extend clear through the tissues. And tell the jury the extent of the third degree burns over his body.
A. Of course, they were at different places. As I remember Doctor Yokum, there was few of them that were third.
Q. Few of them that were third and the other few would be second degree burns?
A. Yes, sir.
Q. When did he regain consciousness?
A. Never.
Q. Was unconscious all the time?
A. Yes.
Q. Did he ever talk?
A. Well, yes.
Q. He talked to you?
A. Yes.
Q. And talked to his family?
A. No.
Q. About what?
A. Railroading engine.
Q. Well, did he talk about the accident?
A. No.
Q. In talking about railroading, what did he talk about?
A. Oh, orders and going in and getting out. Never seemed to get anywhere.
Q. How?
A. Never seemed to get anywhere.
[fol. 64] Q. Well, was his wife present at any time?
A. Yes.
Q. Did he talk with her?
A. Not that I ever knew, to just know her, while I was in there.
Q. Well, were you in there all the time?
A. No, I was not.

Q. Well, now do you know whether or not he groaned or tossed in his bed?

A. Yes.

Q. Well, did he ever complain of pain?

A. Oh, in turning him, as I remember, in turning him we got the extra moan, nothing in the way of talking to us but we got that extra moan and hurt condition.

Q. In turning him?

A. Yes.

Q. And how long did he manifest pain by moaning?

A. Well, that evening to the afternoon he died.

Q. From the time he was brought into the hospital? From the time he was brought into the hospital?

A. Yes.

Q. Now, of course, during the times you were there I presume his wife called at the hospital, too. Did his wife call at the hospital?

A. Yes.

Q. And she would be with him at times?

A. Yes.

Q. And you don't know, of course, would you be there when she was there at times?

A. Some times, yes.

Q. And also she would be alone with him. I think that is all.

[fol. 65] Cross-examination.

Mr. Stringer:

Q. As I understand you, he was unconscious when you got there?

A. Yes.

Q. And he remained unconscious up to the time of his death?

A. Yes.

Q. When you say he talked about railroading, you mean he would make incoherent statements, do you not, Miss Price?

A. Not especially.

Q. Well, as I understood you to say, he was unconscious?

A. Yes.

Q. All the time?

A. Yes: not knowing what he was doing.

Q. What I mean by that is, when he would talk about railroading he wasn't carrying on a conscious conversation?

A. No, he was not.

Q. The talking was really of a really unconscious mind?

A. Yes, he was.

Q. He didn't know what he was doing at that time any of the time?

A. No, he did not.

Q. Never, from the time that you got there until he died?

A. He did not.

Q. That is all.

Mr. Davis: That is all.

[fol. 66] JESSIE HOPE, called and sworn as a witness for and in behalf of the plaintiff, testified as follows:

Mr. Davis:

Q. Mrs. Hope, you are the widow of C. Y. Hope?
A. Yes, sir.
Q. You were subpœnaed here yesterday as a witness?
A. This morning.
Q. And you are also under injunction in Iowa?
A. All I know the men they told me.
Q. Yes, papers were served on you?
A. Yes.

Mr. Davis: Now, we ask the court to, or assuming that a similar showing was made in the other witness, Elder, to direct the witness, Mrs. C. Y. Hope to testify in this case, and that this court has jurisdiction of the subject-matter and that she should proceed to testify.

The Court: The witness is under subpœna out of this court?

Mr. Davis: The witness is under subpœna out of this court.

The Court: The witness, Jessie Hope, having been subpœnaed under the process of this court, will be required to testify.

Mr. Davis:

Q. Mrs. Hope, after this accident when did you first see your husband?
A. When did I first see him?
Q. Yes.
A. It was about twenty-five minutes after one when I went to the hospital.
Q. At Chariton, Iowa?
A. Yes, sir.
[fol. 67] Q. Was he at that time conscious?
A. No, sir.
Q. Did you call on him from time to time from that time to his death?
A. I was there every day most of the time.
Q. During the times that you were there and talked with him did he regain consciousness at times?
A. There was at times he was conscious.
Q. What did he talk about with you when he was conscious?

Mr. Stringer: Objected to.

Mr. Davis:

Q. What would you talk about,—different matters?
A. Yes, sir.

The Court: Overruled.

Mr. Davis:

Q. Did he talk about family matters?

A. He asked me where the children was.

Q. In talking with you did he appear to talk connectedly and lucidly at times?

Mr. Stringer: Objected to as calling for the conclusion of the witness.

The Court: Objection sustained.

Mr. Davis:

Q. Now, then, from the time of his injury to the time of his death were there days, or every time that you called on him, were there times that he would talk with you?

A. Well, he would talk with me about—there was along the first part of the accident after it occurred that he didn't seem to realize, but the latter——

Q. Then afterwards, say for five days before his death, did he talk to you?

A. Yes, sir, he did.

[fol. 68] Q. And what kind of a conversation would it be as to being connected or otherwise?

A. Well I would often ask him where he was hurt and he would say across his chest there.

Q. And in talking that way, tell the jury whether he appeared to talk as he normally did when he talked to you?

A. Why, he did at times.

Q. Did he during the time you saw him ever complain of pain?

A. Yes, he did.

Q. And did you ever notice on occasions as to whether he would lay or toss in bed or wreak with pain?

A. I should say he did.

Q. Just describe what he did there at that time to the jury.

A. Well, he seemed to be in just so much agony that there was times that we had to hold him in bed.

Mr. Stringer: I move to strike out the answer as a mere conclusion.

Mr. Davis: I think it does. We consent.

The Court: Motion granted.

Mr. Davis:

Q. Just tell the jury what he would do, that is, his actions or motions.

A. Well, he wanted to get up all the time.

Q. Well, when he would move did he exhibit any signs of pain?

A. Why, he couldn't be turned over.

Q. Why not?

A. Well, for the pain.

Q. How did you know that?

A. Well, whenever the nurse or any of the doctors—it always

[fol. 69] took two or three to raise him up—whenever they would want to change him—and it would take about three to raise him—he would just go nearly frantic, when they would move him, with pain.

Mr. Stringer: I move to strike out the answer as a conclusion.

Mr. Davis: I think the last part, "frantic with pain," should be——

The Court: Motion granted.

Mr. Davis:

Q. Mrs. Hope, during those times did you ever notice his face as to whether it was turned or otherwise?

A. Sure; he would lay and frown just like he was in terrible agony.

Mr. Stringer: I move to exclude that.

The Court: Strike it out.

Mr. Davis: I think that is all.

Q. How old was Mr. Hope?

A. He was forty-nine years.

Q. Well, was he in good health at the time of the injury?

A. Yes, sir; very best of health.

Cross-examination.

Mr. Stringer:

Q. You were married to Mr. Hope when?

A. The 28th day of November, 1922.

Q. So that you had been married about two months when he died?

A. Eleven weeks the day he died.

Mr. Davis: Do I understand you claim any materiality in that, counsel?

Mr. Stringer: Well, I want to get at the facts.

Mr. Davis: Well, do you claim any materiality?

Mr. Stringer: I think that is all.

[fol. 70] Redirect examination.

Mr. Davis:

Q. Mrs. Hope, during the time that he lived with you, you may tell the jury whether he was a man who stayed at home and stayed with his family.

A. He was.

Q. Was he kind to the children?

A. He was.

Q. And was he when he was off the road was he trying to be away from home or be at home?
A. No, sir; always at home.

Mr. Stringer: That is objected to as irrelevant and immaterial.
The Court: Overruled.

Mr. Davis:

Q. Mrs. Hope, with regard to his disposition and conduct at home, was it kindly or otherwise?
A. He was kind.

Mr. Stringer: Objected to as immaterial.
The Court: Objection sustained.
Mr. Davis: I think that is all.
Mr. Stringer: That is all.
Mr. Davis: Now, it may be stipulated in this case that the deceased, C. Y. Hope, contributed around—earned on the average of $250.00 a month for a year prior to his death and that the widow and dependents of C. Y. Hope, deceased, received from his contributions on an average of from $135.00 to $150.00 per month.
Mr. Stringer: Well, Mr. Davis, I don't know anything about the latter. I wish you would ask her that. I don't know anything about it.

Mr. Davis:

Q. You were dependent upon Mr. Hope for the support and maintenance and the contributions he made to you?
[fol. 71] A. I was.

Mr. Stringer: But during the marriage relation, of course.
Mr. Davis: It may be understood that the contributions were made during their marriage relation and that at all times during the period of contributions that he was furnishing on an average—was earning on an average of $250.00 a month.
Mr. Davis: Now, if it please your Honor, we offer to read into the evidence from the American Experience table of Mortality the expectancy of a man forty-nine years of age, showing that his normal expectancy would be 21.63 years, and offer the same as evidence of that fact. Any objection?
Mr. Stringer: No. Just let me—I didn't get the figures.
Mr. Davis: 21.63.
Mr. Davis: We now offer to read into the record from the Travellers' Insurance Company book the present value—that the present value of one dollar per year, due at the end of each year, invested safely, invested at the rate of four and a half per cent, the rate of four and a half per cent for twenty-two years, is $13.78.
Mr. Stringer: What is it for twenty-one years?
Mr. Davis: For twenty-one years is $13.40. The present value of one dollar at five per cent for twenty-one years is $12.82 and for twenty-two years is $13.16.

The Court: At five per cent?

Mr. Davis: At five per cent.

The Court: Less than at four and a half. Is that the way you read it?

Mr. Davis: No; $13.16. Oh, yes, it is always less. Yes, that is [fol. 72] right. And at six per cent. for twenty-one years is $11.76; for twenty-two years is $11.76, and for twenty-two years $12.04.

Mr. Davis: It is agreed that on the dependency, that no claim is made for the dependency of the children but that the contributions stipulated as being made, $135.00 to $150.00 dollars a month, was contributions made for the use and benfit of the widow, Jessie Hope, for which she was dependent. I think that covers it.

Mr. Stringer: Well that doesn't strike me as being very clear.

Mr. Davis: And that no additional claim is made for any dependency of the children.

Mr. Stringer: And that the administrator seeks no recovery here on their behalf.

Mr. Davis: And that the administrator seeks no recovery here on their behalf. All right. Anything else?

Mr. Stringer: No.

Mr. Davis: Plaintiff rests.

The Court: Take a fifteen minute recess.

Mr. Davis:

Q. Mrs Hope, what time did your husband die?

A. On the 13th day of February.

OFFERS IN EVIDENCE

(Certified copy of laws of Iowa marked defendant's exhibit C.)
(Certified copy of judgment marked defendant's exhibit D.)

Mr. Stringer. The defendant will offer in evidence defendant's exhibit C.

Mr. Davis: Objected to as incompetent, irrelevant and immaterial, not within the issues, no foundation laid.

Mr. Stringer: And in connection with that we offered in evidence [fol. 73] the defendant's exhibit D, being a certified copy of the judgment of the District Court of Lucas County, Iowa.—

Mr. Davis: That is objected to as incompetent, irrelevant and immaterial and not with the issues of this case.

Mr. Stringer: In an action entitled, Mrs. C. Y. Hope, claimant, the Chicago, Rock Island & Pacific Railway Company, defendant, wherein and whereby it was adjudged and decreed that the plaintiff's decedent C. Y. Hope, at the time he sustained his injuries, was engaged in intrastate commerce and was not engaged in interstate commerce.

The Court: I think I shall sustain the objection to the exhibits and reserve the question for future consideration. It seems to me

that it is quite important and that the court should take some time in investigating the matter, if the court has an opportunity to review it.

Mr. Stringer: It seems to me that for the purpose of the record it might be well to admit them but reserve the instruction to the jury as to the effect of them and—not permitting the jury to have them.

The Court: For the purpose of a motion, they are in the record. If counsel wants those exhibits in the record for the purpose of the motion, he may have them in the record for that purpose.

Mr. Davis: But I understand the court holds they are not material.

The Court: The court holds they are inadmissible.

[fol. 74] Mr. Stringer: As I understand the ruling of your Honor is this and that the record shows that while the court considers and your Honor is of the present opinion that the two exhibits C and D are inadmissible, yet they may be considered as being in the record to that extent, but no further; that if the defendant desires to make a motion for a directed verdict in whole or in part based upon said exhibits, that the exhibits may be considered in the record for that purpose, but for that purpose only.

The Court: That is correct. The record may show that the court will consider the exhibits for the purpose of the motion, as indicated.

(Paper marked defendant's exhibit E.)
(Paper marked defendant's exhibit F.)

Mr Stringer: We offer in evidence defendant's exhibit E, being the exemplified copy of the proceedings in the District Court of Polk county, Iowa, and resulting in the appointment of E. R. Byers as primary administrator of the estate in Iowa.

Mr. Davis: That is objected to as incompetent, irrelevant and immaterial, no foundation laid, not within the issues, and is absolutely invalid and of no force and effect in this action.

Mr Stringer: Also offer in evidence an exemplified copy of a certain proceedings of the District Court of Polk County, Iowa, brought by E. R. Byers as administrator of the estate of Clarence Y. Hope against this defendant.

Mr. Davis: Same objection.

Mr. Stringer: The reason why we offer it in evidence is to show that the administrator of the domiciliary estate has taken possession of that cause of action and that it doesn't float around the country [fol. 75] in the hands of any ancillary administrator that they see fit to appoint.

The Court: Objection sustained.

Mr. Stringer: May the record show that these exhibits are in the case for the same purpose, for the purpose of direction of a verdict, but for no other purpose, the same as the other exhibits?

The Court: The same ruling may apply to defendant's exhibits "E" and "F" as were made with respect to defendant's exhibits "C" and "D".

Mr. Stringer: We rest.

Mr. Davis: Plaintiff rests.

Defendant's Motion for a Directed Verdict

Mr. Stringer: Defendant now moves the court to instruct the jury to render a verdict in favor of the defendant and against the plaintiff on the ground that it clearly appears from all the testimony that the plaintiff's decedent was at the time of his injury engaged wholly in intrastate commerce within the State of Iowa and that he was not in any way engaged in interstate commerce, and that consequently any remedy in the premises arises not under the Federal Employers' Liability Act, under which this action is brought, but under the Workmen's Compensation Act of the State of Iowa.

On the further ground that the question of whether the plaintiff's decedent was at the time of his injury engaged in interstate commerce has been determined by the District Court of Lucas County, Iowa, by a final judgment, in which it was adjudged and decreed that the plaintiff's decedent was at the time of his injury engaged wholly in intrastate commerce and not in any way in interstate commerce; [fol. 76] and that such judgment of said Iowa court is res adjudicata of said matter and is a bar to the prosecution of this action; and that said judgment is entitled to full faith and credit in this court under the Constitution of the United States; and that if the court refuses to direct a verdict and to recognize said decision as res adjudicata and binding, it will operate to deny this defendant its constitutional rights under that provision of the Constitution of the United States which provides that full faith and credit to all judgments and judicial proceedings of a sister state shall be given by the courts of each other state.

On the further ground that it appears conclusively from the testimony that said Clarence Y. Hope was at the time of his death a resident of the State of Iowa and that the courts of said State of Iowa have appointed an administrator at the place of his domicile and that under the Employers' Liability Act of the United States any cause of action in the premises is vested in said domiciliary administrator, who alone has the right to prosecute any action for death under said Federal Employers' Liability Act, and is vested with said cause of action, and that this plaintiff as representative has no title to any cause of action arising out of the death of said Hope.

Mr. Davis: To the said motion and the whole thereof plaintiff respectfully resists.

The Court: Motions denied.

[fol. 77]

Charge to Jury

Members of the Jury: This is an action in which A. D. Schendel, as special administrator of the estate of Clarence Y. Hope, deceased, is the plaintiff, and the Chicago, Rock Island & Pacific Railway Company is the defendant.

The plaintiff brings this action under the Employers' Liability Act. That is an act of Congress that was passed for the benefit of

men who work on railroads, and who are engaged in interstate commerce, and so in this case upon the first issue that will be submitted to you the Federal Employers' Liability Act of Congress, will have to be considered by you and the issue under that act determined by you members of the jury.

Under this law every common carrier by railroad shall be liable in damages to any employee suffering injury while engaged in interstate commerce, or in case of the death of such employee to the surviving widow and children of such employee dependent upon him previous to such injury or death resulting in whole or in part from the negligence of any of the agents or employees of such carrier, or by reason of any defect or insufficiency due to the negligence of the carrier in its tracks and roadbeds. That is the part of the act that is here material in this case.

Now, the first question for your members of the jury to determine in this case is whether at the time the decedent, Clarence Y. Hope met his injury both the decedent and the defendant were [fol. 78] engaged in interstate commerce. That is the first question that you will consider. If you find that at that time the decedent, C. Y. Hope, was not engaged in interstate commerce, then the plaintiff cannot recover in this action, and in that event your verdict will be for the defendant. On the other hand, if you find that at the time in question the decedent was engaged in interstate commerce, you would find for plaintiff on that issue, and then you would proceed to determine the other issues in the case as the court will submit them to you later.

It is undisputed that the defendant in this case, the Chicago, Rock Island & Pacific Railway Company, is an interstate carrier by railroad and generally engaged in interstate commerce. The defendant contends that at the time decedent was injured the defendant was engaged purely in work not interstate in character and that the defendant and the decedent were engaged wholly in intrastate commerce. It is a question of fact for you to determine from all the evidence in the case whether or not the work in question was intrastate at the time decedent was injured.

An employee is engaged in interstate commerce when he has work directly with or about interstate cars or shipments; that is, cars or shipments going from one state to another. An employe may also be engaged in interstate commerce even though he be not working about such cars or shipments at the precise time he was injured and if his work was so closely and intimately connected with the general interstate work of the carrier as to be deemed in law a part of it. In other words, was the work of the employee, Clarence Y. Hope, at [fol. 79] the time of his injury, so closely related to the general interstate work of the railroad company as to be practically a part of it? Was his work being done independently of the general interstate commerce in which the defendant was engaged? Was his work a matter of indifference so far as the general interstate employment of the defendant was concerned?

These are questions which you should determine from all the

evidence which you have listened to in this case relative to the work being done at the time and just before Clarence Y. Hope was injured. If after a review of all of this testimony, you are of the opinion that decedent's work has no relation to the general interstate work of the carrier and that he was not engaged in interstate commerce, then your verdict should be for the defendant on that issue and that would end the case. On the other hand, if you believe from this evidence that the decedent's work was so closely connected with the general interstate work of the railroad company as to be deemed a part of it, and if you believe that such was not a matter of indifference to the defendant and was not being done independently of its interstate commerce, but that in fact it was so closely related to defendant's general interstate work as to be practically a part of it, then your verdict should be for the plaintiff on that issue, that decedent and defendant were at the time engaged in interstate commerce.

An employe going to or returning from work of an interstate character is engaged in interstate commerce if injured while on the premises of the employer.

[fol. 80] Now, that is the first issue, members of the jury, for you to determine, and you will distinguish interstate commerce as commerce between several states and intrastate commerce as commerce wholly within the state.

Now, as I have stated, if you determine that question and you say that the decedent at the time of the injury was not engaged in interstate commerce, then your verdict will be for the defendant. If you say that he was engaged in interstate commerce, then your verdict will be for the plaintiff. And upon that issue the burden of proof is upon the plaintiff, and the plaintiff must satisfy you by a fair preponderance of the evidence that the claims that he makes that the decedent at the time of the injury—at the time of the wreck —was engaged in interstate commerce. The defendant denies that the decedent at the time of the injury was engaged in interstate commerce.

Now, if you say that the decedent at the time of the injury was in fact engaged in interstate commerce, then you will go to the question of damages, because in this case the defendant admits that the decedent was injured on the 4th day of February, 1923, through the negligence of the defendant railroad company; and it is admitted in this case that he—or the evidence shows that the decedent, Clarence Y. Hope, died on the 13th day of February, 1923, as the result of the injuries that he sustained on account of the negligence of the defendant railway company. So that if you find that the decedent was engaged in interstate commerce, then by reason of those admissions on the part of the defendant railway company you go to the question of damages and determine what amount in dollars [fol. 81] and cents the plaintiff is entitled to as a verdict in this case.

The Congress of the United States has provided that in case of this character the right of action survives and that there may be a

recovery for the conscious pain and suffering of decedent from the time of his injury until his death. You will, therefore, determine from the evidence whether the decedent in fact suffered from conscious pain and suffering and the period or length of time of such conscious pain and suffering endured and continued.

If you find that the decedent did suffer such conscious pain, then you may, if you find for the plaintiff under the instructions given, that is, if you find for the plaintiff on the issue of interstate commerce which has been submitted to you, award the plaintiff such damages as you believe from all the evidence would compensate him for the conscious pain and suffering you find he endured from the time that he received such injury until the time of his death.

Under this law the right of action survives to the widow and next of kin of the decedent. You will figure in dollars and cents the amount that the plaintiff is entitled to for such conscious pain and suffering that the decedent endured from the time of his injury to the time of his death under this instruction.

That is the first element of damage that you will consider.

Under the law applicable to this case, the plaintiff, if entitled to recover, is entitled to recover also as damages, in addition to the damages compensating him for pain and suffering, such sums as [fol. 82] you find from the evidence will fairly and reasonably compensate the decedent's surviving widow, Jessie Hope, for the pecuniary loss she has sustained by reason of the death of her husband, C. Y. Hope. In arriving at this sum you have a right to take into consideration the earning capacity of C. Y. Hope, the amount he contributed to his wife, Jessie Hope, for her support, care and maintenance, his age, habits and state of health at the time of the injury.

Evidence has been introduced in this case to show the normal expectancy of life of a person forty-nine years of age to be 21.63 years.

This evidence should be considered by you in determining this question. It is not necessarily conclusive, as a person might live long beyond the period of his normal expectancy, or he might die long before such time; but you have the right to consider these tables as evidence in the case, and it is for you to determine from all the evidence in the case the length of time decedent would have lived and contributed to the support of his surviving widow.

When you have determined this and you have determined the amount of the annual contributions of the decedent to his widow, you should then reduce the sum you so find to its present value—the value at the present time. By present value is meant such sum which if put out at interest at a given rate would produce for the period of the expectancy the amount of the annual contribution and with the last payment both principal sum and interest would be exhausted. In other words, if, for example, the contributions were one dollar a year for a period of ten years, the jury would figure [fol. 83] what sum, if put out at a reasonable rate of interest, would produce one dollar a year for ten years, and with the last payment both principal and interest would be used up.

In this connection, evidence has been produced in this case to show the present worth or value of one dollar a year for different

periods. This evidence may be considered by you in arriving at the present worth of the annual contributions of the decedent to his widow, if you reach the question of damages in this case under the instructions given.

Upon the question damages also the burden of proof is upon the plaintiff to satisfy you by a fair preponderance of the evidence of the claims that the plaintiff makes with reference to the damages and the amount the plaintiff is entitled to as damages in this case. On the question of damages the court can give you no other guide than what I have given you. That is the guide that you are to follow in assessing damages in this case, and it is a matter within the sound discretion of the jury under the instructions here given to you as to what amount of damages, if any, the plaintiff is entitled to in this case.

Now, you members of the jury are the sole and exclusive judges of the facts in the case, of the credibility of the witnesses and the weight that you will give to the testimony of the various witnesses who have testified.

I believe there are several exhibits that are in evidence and you will take them to the jury room with you and consider those exhibits in connection with the oral testimony here given in court.

[fol. 84] Now, members of the jury, it is your duty to take the law from the court in this case, because it is the duty of the court to assume the law in the case. It is the duty of the jury to take the responsibility for the facts; you take the law from the court, apply it to the facts in this case and retire to your jury room and deliberate upon this case fairly and impartially and return your verdict into court.

There are two forms of verdict that will be submitted to you, a verdict for the plaintiff. If you find for the plaintiff under the instructions given, your foreman, whom you will select after you retire to your jury room, will sign the verdict and insert the date and you insert the amount of damages that you say the plaintiff is entitled to. If you find for the defendant, your foreman will merely insert the date and sign the verdict. Both verdicts have been prepared for your convenience.

During the first twelve hours of your deliberations your verdict must be unanimous. If you cannot agree during the first twelve hours, then you may return a verdict if ten or eleven of you agree, but in that event the ten or eleven of you who do agree must all sign the verdict, and in that event your foreman will not be required to sign it. If court is in session or the court is available when you have arrived at a verdict, the court will be here to receive it. If a verdict is returned at an unseasonable hour, I presume counsel will agree on a sealed verdict.

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Davis: We will.

The Court: In that event, after you have agreed upon a verdict, your foreman may put your verdict in an envelope and seal it and

[fol. 85] take it with you and you may then separate for the night and then all return here in court tomorrow morning at the opening hour and return your verdict into court at that time.

The Court: Are there any suggestions on the part of counsel?

Mr. Davis: No suggestions at all. I believe that these exhibits, copies of them made, and they will be sent out, the train orders, they are exhibits. He took his originals. Those are not marked.

The Court: Is it agreed that the copies may go to the jury in lieu of the originals?

Mr. Davis: Yes.

Mr. Stringer: Yes.

The Court: All right. You may swear an officer.

PLAINTIFF'S EXHIBIT NO. 1

STATE OF MINNESOTA,
County of Hennepin, ss:

Special Letters of Administration

A. D. Schendel of Hennepin County, Minnesota, is hereby appointed Special Administrator of the estate of Clarence Y. Hope, late of Lucas County, Iowa, deceased.

Witness, Hon. John A. Dahl, Judge of the Probate Court in the County of Hennepin, and the seal of the Court, affixed the 20th day of February, A. D. 1923.

By the Court.

John A. Dahl, Judge. (Probate Court Seal.)

[fol 86] STATE OF MINNESOTA,
County of Hennepin, ss:

PROBATE COURT

I, James G. Kehoe, Clerk or the Probate Court, within and for said County of Hennepin and custodian of the seal and records of said Court, do hereby certify that I have compared the foregoing copy of the record of the Special Letters of Administration, in the matter of the estate of Clarence Y. Hope, deceased, with the original records thereof now remaining in this office and have found the same to be correct transcripts therefrom, and of the whole of such original records. And I further certify that said exemplification would be received in evidence in all the Courts of the State of Minnesota.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Minneapolis, in said County, this 20th day of February, A. D. 1923.

(Seal.) James K. Kehoe, Clerk of the Probate Court

Defendant's Ex. A, Elder vs. C., R. I. & P. Plaintiff's Ex. No. 2, Schendel vs. C. R. I. & P.

[fol. 87] PLAINTIFF'S EX. No. 2

3-4-24

	No. 2		2-4
C	MR		1181
87544	FB	84	347
	U Jet		834
	MR 85		1253
C	FB U Jet		325
88298			928
80	D B	U Jet	
C 87413	D		
C 86038		AR	
C 89252	D		
MWS 1191			
C 82499	H		
LON 77906	F	U Jet	
C 88243	F	St. Joe	
LON 62565	F	St. Joe	
KCS 27783			

DEFENDANT'S EX. A, SCHENDEL VS. C. R. I. & P.

3-4-24

W	D	Allebre	
C 99271	F	U Jet	
C 100221	F		
C 98251	F		
CGN 15533	F		
C 87021	D		
C 82785			
C 82324	D		
C 84220			
C 84322			
C 99750	MR	95	1274
C	DB		48
99780	U Jet		856
100			

[fol. 88]

C	MR	96	1411
84322	DB		403
100	U Jet		1008
C	MR	97	1391
84220	DB		415
100	U Jet		976
C	MR	98	1365

82324		DB		413
		U Jet		952
C		MR	99	1660
82785		DB		482
100		U Jet		1178
C 99271		F	100	Allerton
C 100221		F		U Jet
C 98251		F		
VGN 15533		F		
C 87021		F		
C		MR		1444
82166		DB		409
100	121	U Jet		1035
C		MR		1367
84135		DB		397
100	122	U Jet		970
LVN 79127		Allerton		1463
100		MR		368
	123	HB		1098
KCFSM				
73782		LUP		1236
100		FB		394
				842
			Olnetz	
C	124	MR		1366
83998				391
100		U Jet		9975
Ext. "D"				

Manifest Burned Hope Caboose

2-4-23

[fol. 89] PLAINTIFF'S EXHIBIT No. 3

Schendel vs. C. & R. I. Ry. Co.
3-4-24.

The Chicago Rock Island & Pacific Railway Company

The Chicago Rock Island & Gulf Railway Company

Des Moines, Feb. 4, 1923.

Train Order No. 21
To C. & E. Wk Extra 1574
Form) At Pershing
31) x. at 1209 P. M. C Y H Operator.

No. 912 eng unknown and all eastward extras wait at Chariton until 1:30 P. M. All 1st class trains due Pershing before 12:10 P. M. have arrived or left.

B T

Repeated at 12:09 P. M. C. Y. H. Operator.
Signed by Train made time Dispatcher Operator Hope Eng. 1574
C O M 12:09 J. E. G. Hope
P. M.

Copy of original.

[fol. 90] DEFENDANT'S EXHIBIT "B"

Schendel vs. C. & R. I. Co.
3-4-24.

The Chicago Rock Island & Pacific Railway Company

The Chicago Rock Island & Gulf Railway Company

Des Moines, Feb. 4, 1923.

Train Order No. 10.
To C. & E. Eng 1491 and Eng 1574.
Form) At Chariton
19) x. at 6:50 A. M. C D N Operator.
Eng 1491 and Eng 1574 work Seven Thirty 7:30 A. M. until One 1 P. M. Between Chariton and Williamson protecting against each other and against second 2nd class trains. All Extras West wait at Williamson until one 1 P. M. All Extras East wait at Chariton until One 1 P. M.

B Y

Made C. O. M. Time 6:50 A. M. By B. F. Y.

Montgomery Operator.
Copy of Original.

DEFENDANT'S EX. C

State of Iowa, Secretary of State

Schendel vs. C. R. I. & P.
3-4-24.
Defendant's Ex. G.
Elder vs. C. R. I & P.
3-3-24.

I, W. C. Ramsey, Secretary of State of the State of Iowa, do hereby certify that the attached booklet is published and distributed by the authority of the State of Iowa.
[fol. 91] I do further certify that Pages 8 to 48 inclusive, of said booklet, constitute and are the statutes of the State of Iowa now in force and in full force and effect on the 4th day of February, 1923, upon the subject of Employers' Liability and Workmen's Compensation as the original statutes remain of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the official seal of the Secretary of State of the State of Iowa.

Done at Des Moines, this 4th day of June, A. D. 1923.

W. C. Ramsey, Secretary of State. (Seal.)

Workmen's Compensation Law

Text of Statute

Title XII, Chapter 8-A, Supplement to the Code, 1913, as Amended by the 37th, 38th, and 40th General Assemblies

Part I

Section 2477-m. Employers—employes—exceptions. (a) Presumption—Employes excepted.—Except as by this act otherwise provided, it shall be conclusively presumed that every employer as defined by this act has elected to provide, secure and pay compensation according to the terms, conditions, and provisions of this act [fol. 92] for any and all personal injuries sustained, by an employe arising out of and in the course of the employment; and in such cases the employer shall be relieved from other liability for recovery of damages or other compensation for such personal injury, unless by the terms of this act otherwise provided; but this act shall not apply to any household or domestic servant, farm or other laborer engaged in agricultural pursuits, nor persons whose employment is of a casual nature. The provisions of this act shall not apply as between a municipal corporation, city or town and any person or persons receiving any benefits under, or who may be entitled to, benefits from any "firemen's pension fund" or "policemen's pension fund" of any municipal corporation, city or town.

(b) Compulsory—Where the state, county, municipal corporation, school district, cities under special charter or commission form of government is the employer, the terms, conditions and provisions of this act for the payment of compensation and amount thereof for such injury sustained by an employe of such employer shall be exclusive, compulsory and obligatory upon both employer and employe.

(c) Rejection of Terms—Reasons for.—An employer having the right under the provisions of this act to elect to reject the terms, conditions and provisions thereof and (who) in such case exercises the right in the manner and form by this act provided, such employer shall not escape liability for personal injury sustained by an employe of such employer when the injury sustained arises [fol. 93] out of and in the usual course of the employment because:

(1) The employe assumed the risks inherent in or incidental to or arising out of his or her employment, or the risks arising from the failure of the employer to provide and maintain a reasonably safe place to work, or the risks arising from the failure of the em-

ployer to furnish reasonably safe tools or appliances, or because the employer exercised reasonable care in selecting reasonably competent employes in the business;

(2) That the injury was caused by the negligence of the co-employe;

(3) That the employe was negligent unless and except it shall appear that such negligence was wilful and with intent to cause the injury; or the result of intoxication on the part of the injured party.

(4) (d) Negligence Presumed—Burden of Proof—Notices of Election to Reject—Presumption on Failure to Give Notice.—In actions by an employe against an employer for personal injury sustained arising out of and in the course of the employment where the employer has elected to reject the provisions of this act, it shall be presumed that the injury to the employe was the direct result and growing out of the negligence of the employer; and that such negligence was the proximate cause of the injury; and in such cases the burden of proof shall rest upon the employer to rebut the presumption of negligence.

Every such employer shall be conclusively presumed to have elected to provide, secure and pay compensation to employes for injuries sustained arising out of and in the course of the employ-
[fol. 94] ment according to the provisions of this act, unless and until notice in writing of an election to the contrary shall have been given to the employes by posting the same in some conspicuous place at the place where the business is carried on, and also by filing notice with the Iowa industrial commissioner with return thereon by affidavit showing the date that notice was posted as by this act provided. Provided, however, that any employer beginning business after the taking effect of this act and giving notice at once of his desire not to come under the provisions of this act shall not be considered as under the act; provided, however, that such employer shall not be relieved of the payment of compensation as by this act provided until thirty days after the filing of such notice with the Iowa industrial commissioner, which notice shall be substantially in the following form:

Employers' Notice to Reject

To the employes of the undersigned and the Iowa industrial commissioner:

You, and each of you, are hereby notified that the undersigned rejects the terms, conditions and provisions to provide, secure and pay compensation to employes of the undersigned for injuries received as provided in the acts of the—(thirty-fifth) general assembly known as chapter—(one hundred forty-seven), and elects to pay damages for personal injuries received by such employe under the common law and statutes of this state modified by subdivisions one, two, three and four of section one, chapter—(one hun-

dred forty-seven) of the acts of the—(thirty-fifth) general assembly [fol. 95] and acts amendatory thereto.

(Signed —— ——.

STATE OF IOWA,
County, ss:

The undersigned being first duly sworn deposes and says that a true, correct and verbatim copy of the foregoing notice was on the — day of ——, 19—, posted at —— (state fully place where posted).

—— ——.

Subscribed and sworn to before me by —— ——, this — day of ——, 19—.

—— ——, Notary Public.

The employer shall keep such notice posted in some conspicuous place which shall apply to the employes subsequently employed by the employer with the same force and effect and to the same extent and in like manner as employes in the employ at the time the notice was given.

Where the employer and employe have not given notice of an election to reject the terms of this act, every contract of hire express or implied, shall be construed as an implied agreement between them and a part of the contract on the part of the employer to provide, secure and pay, and on the part of the employe to accept compensation in the manner as by this act provided for all personal injuries sustained arising out of and in the course of the employment.

Sec. 2477-m1. Wilful Injury—Intoxication.—No compensation under this act shall be allowed for an injury caused:

(a) By the employe's wilful intention to injure himself or to [fol. 96] willfully injure another; nor shall compensation be paid to an injured employe if injury is sustained where intoxication of the employe was the proximate cause of the injury.

Sec. 2477-m2. Rights of Employe—Notice to Reject.—(a) Exclusive of Other Rights—Presumption—Notice.—The rights and remedies provided in this act for an employe on account of injury shall be exclusive of all other rights and remedies of such employe, his personal or legal representatives, dependents or next of kin, at common law or otherwise, on account of such injury; and all employes affected by this act shall be conclusively presumed to have elected to take compensation in accordance with the terms, conditions and provisions of this act until notice in writing shall have been served upon his employer, and also on the Iowa industrial commissioner, with return thereon by affidavit showing the date upon which notice was served upon the employer.

(b) Rejection—Procedure—Oath—Form—Undue Influence.—In the event such employe elects to reject the terms, conditions and

provisions of this act, the rights and remedies thereof shall not apply where an employe brings an action or takes proceedings to recover damages or compensation for injuries received growing out of and in the course of his employment, except as otherwise provided by this act; and in such actions where the employe has rejected the terms of this act the employer shall have the right to plead and rely upon any and all defenses, including those at common law, and the rules and defenses of contributory negligence, assumption of risk and fellow-servant shall apply and be available to the employer as by [fol. 97] statute authorized unless otherwise provided in this act. Provided, however, that if an employe sustains an injury as the result of the employer's failure to furnish or failure to exercise reasonable care to keep or maintain any safety device required by statute or rule, or violation of any of the statutory provisions or rules and regulations now or hereafter in force relating to safety of employes, the doctrine of assumed risk in such case growing out of the negligence of the employer shall not apply or be available as defensive matter to such offending party. The notice required to be given by an employe shall be substantially in the following form:

Employes' Notice to Reject

To —— —— (name of employer) and the Iowa Industrial Commissioner:

You, and each of you, are hereby notified that the undersigned hereby elected to reject the terms, conditions and provisions of an act for the payment of compensation as provided by (chapter one hundred forty-seven of) the acts of the (thirty-fifth) general assembly and acts amendatory thereto, and elects to rely upon the common law as modified by section three of (chapter one hundred forty-seven of) the acts of the — (thirty-fifth) general assembly for the right to recover for personal injury which I may receive, if any, growing out of and arising from the employment while in line of duty for my employer above named.

[fol. 98] Dated this — day of ——, 19—.

(Signed) —— ——.

State of Iowa,
—— County, ss:

The undersigned being first duly sworn deposes and says that the written notice was on the — day of ——, 19—, served on the within named employer of the undersigned by delivering to —— —— a true, correct and verbatim copy thereof.

—— —— (Name of Person Served).

Subscribed and sworn (or affirmed) to before me by the said —— —— this — day of ——, 19—. —— ——, Notary Public.

In any case where an employe or one who is an applicant for employment elects to reject the terms, conditions and provisions of

this act, he shall, in addition to the notice required by subdivision (b) of section three of this act, state in an affidavit to be filed with said notice who, if any person, requested, suggested, or demands of such person to exercise the right to reject the provisions of this act. And if request, suggestion, or demand has been made of such employe by any person, such employe shall give and state the name of the person who made the request, suggestion, or demand, and all of the circumstances relating thereto, the date and place when and where made, and persons present, and if it be found that the employer of such employe, or an employer to whom an applicant for employment, or any persons a member of the firm, association, corporation, or agent or official of such employer, made a request, [fol. 99] suggestion or demand of such employe or applicant for employment to reject the terms, conditions and provisions of this act, such request, suggestion or demand if made under such conditions, shall be conclusively presumed to have been sufficient to have unduly influenced such employe or an applicant for employment to exercise the right to reject the terms of this act, and the rejection made under such circumstances shall be conclusively presumed to have been procured through fraud and thereby fraudulently procured, and such rejection shall be null and void and of no effect.

No persons interested in the business of such employer, financially or otherwise, shall be permitted to administer the oath to the affidavit required in case an employe or applicant for employment elects to exercise the right to reject the provisions of this act. And the person administering such oath in making such affidavit shall carefully read the notice and affidavit to such person making such rejection, and shall explain that the purpose of the notice is to bar such person from recovering compensation in accordance with the schedule and terms of this act in the event that he sustains an injury in the course of such employment; all of which shall be shown by certificate of the person administering the oath herein contemplated. The Iowa industrial commissioner, or any person acting for such commissioner, shall refuse to file the notice and affidavit, unless such notice, affidavit and certificate fully, and in detail, comply with the requirements hereof. And if such rejection, affidavit and certificate is found insufficient for any cause, (it) [fol. 100] shall be returned by mail or otherwise to the person who executed the instrument.

Sec. 2477-m3. Tenure of election.—(a) Until Provisions Complied with.—When the employer or employe has given notice in compliance with this act electing to reject the terms thereof such election shall continue and be in force until such employer or employe shall thereafter elect to come under the provisions of this act as is provided in subdivision (b) of this section.

(b) Notice—How Filed.—When an employer or employe rejects the terms, conditions or provisions of this act, such party may at any time thereafter elect to waive the same by giving notice in writing in the same manner required of the party in electing to reject

the provisions of the act and which shall become effective when filed with the Iowa industrial commissioner.

Sec. 2477m4. Liability of Employer After Election to Reject.—Where the employer and employe elect to reject the terms, conditions and provisions of this act, the liability of the employer shall be the same as though the employe had not rejected the terms, conditions and provisions thereof.

Sec. 2477-m5. Subsequent Election to Reject—Security for Compensation.—An employer having come under this act, who thereafter elects to reject the terms, conditions and provisions thereof, shall not be relieved from the payment of compensation to such employe who sustains an injury in the course of the employment before the election to reject becomes effective; and in such cases the employer shall be required to secure the payment of any compensation due or that may become due to such workman, subject [fol. 101] to the approval of the Iowa industrial commissioner.

Sec. 2477-m6. Liability of Other Than That of Employer. Where an employe coming under the provisions of this act receives an injury for which compensation is payable under this act and which injury was caused under circumstances creating a legal liability in some person other than the employer, to pay damages in respect thereof:

(a) Proceedings Against Both Parties.—The employe or beneficiary may take proceedings both against that person to recover damages and against the employer for compensation, but the amount of the compensation to which he is entitled under this act shall be reduced by the amount of damages recovered.

(b) Indemnity—Subrogation.—If the employe or beneficiary in such case recovers compensation under this act, the employer by whom the compensation was paid or the party who has been called upon to pay the compensation, shall be entitled to indemnity from the person so liable to pay damages as aforesaid, and shall be subrogated to the rights of the employe to recover therefor.

Sec. 2477-m7. Contract to Relieve not Operative.—No contract, rule, regulation or device whatsoever shall operate to relieve the employer, in whole or in part from any liability created by this act except as herein provided.

Sec. 2477-m8. Notice of Injury—Form—Failure to Give.—Unless the employer or representative of such employer shall have actual knowledge of the occurrence of an injury, or unless the employe or someone on his behalf, or some of the dependents or someone [fol. 102] on their behalf, shall give notice thereof to the employer within fifteen days of the occurrence of the injury, then no compensation shall be paid until and from the date such notice is given or knowledge obtained; but if notice is given or the knowledge obtained within thirty days from the occurrence of the injury,

no want, failure or inaccuracy of a notice shall be a bar to obtaining compensation, unless the employer shall show that he was prejudiced by such want, defect or inaccuracy, and then only to the extent of such prejudice. Provided, that if the employe or beneficiary shall show that his failure to give prior notice was due to mistake, inadvertance, ignorance of fact, or law, or inability, or to the fraud, misrepresentation or deceit of another or to any other reasonable cause or excuse, then compensation may be allowed unless and then to the extent only that the employer shall show that he was prejudiced by failure to receive such notice. Provided, further, unless knowledge is obtained or notice given within ninety days after the occurrence of the injury, no compensation shall be allowed. No form of notice shall be required but may substantially conform to the following form:

Form of Notice

To —— ——:

You are hereby notified that on or about the — day of ——, 19—, personal injury was sustained by —— —— while in your employ [fol. 103] at —— (give name of place employed and point where located when injury occurred) and that compensation will be claimed therefor

(Signed) —— ——.

but no variation from this form of notice shall be material if the notice is sufficient to advise the employer that a certain employe, by name, received an injury in the course of his employment on or about a specified time at or near a certain place. Notice served upon one (upon) whom an original notice may be served in civil cases shall be a compliance with this act.

The notice required to be given to the employer may be served by any person over sixteen years of age, who shall make return upon a copy of the notice, properly sworn to, showing the date of service where and upon whom served, but no special form of the return of service of the notice shall be required. It shall be sufficient if the facts therefrom can be reasonably ascertained. The return of service may be amended at any time.

Sec. 2477-m9. Compensation Schedule.—If any employe has not given notice to reject the terms, conditions and provisions of this act, or has given such notice and waived the same as by this act provided, and the employer has not rejected the terms, conditions and provisions of the act or has given such notice and waived the same and the employer receives a personal injury arising out of and in the course of the employment, compensation shall be paid as herein provided.

(a) The compensation provided for in this act shall be paid in [fol. 104] accordance with the schedule unless otherwise provided.

(b) At the time of the injury and thereafter during the disability, but not exceeding four weeks of incapacity, the employer, if so requested by the employe, or any one for him, or if so ordered by the court or Iowa Industrial Commissioner shall furnish reasonable surgical, medical and hospital services, and supplies therefor, not exceeding one hundred ($100.00) dollars. Provided, however, that in exceptional cases, an application may be made in writing to the Iowa Industrial Commissioner for additional surgical, medical and hospital services, and supplies therefor, in which case a copy of such application shall be mailed to the employer or his insurer. If such application is approved by the commissioner, then the employer shall furnish such additional services and supplies for such period, and in such amount as the Iowa Industrial Commissioner shall order, but in no event to exceed one hundred ($100.00) dollars.

(c) Where the injury causes death the compensation under this act shall be as follows:

The employer shall in addition to any other compensation pay the reasonable expense of the employe's last sickness and burial not to exceed one hundred dollars. If the employe leaves no dependents this shall be the only compensation.

(d) If death results from the injury, the employer shall pay the dependents of the employe wholly dependent upon his earnings for support at the time of the injury, a weekly payment equal to sixty per cent of his average weekly wages, but not more than fifteen ($15.00) dollars nor less than six ($6.00) dollars per week for a [fol. 105] period of three hundred weeks.

(e) If the employe leaves dependents only partially dependent upon his earnings for support at the time of the injury, the weekly compensation to be paid as aforesaid shall be equal to the same proportion of the weekly payments for the benefit of persons wholly dependent as the amount contributed by the employe to such partial dependents bears to the annual earnings of the deceased at the time of the injury. When weekly payments have been made to an injured employe before his death, the compensation to dependents shall begin from the date of the last of such payments, but shall not continue more than three hundred weeks from the date of the injury.

(f) Where injury causes death to an employe, a minor, whose earnings were received by the parent, the compensation to be paid the parent shall be two-thirds of the amount provided for payment in subdivision (d) section ten (nine).

(g) No compensation shall be paid for an injury which does not incapacitate the employe for a period of at least two weeks from earning full wages; provided, however, that this provision shall not apply to those injuries resulting in disability partial in character and permanent in quality and compensated according to the schedule

found in section twenty-four hundred seventy-seven-m-9 (j) 2477-m-9-j), Supplement to the Code, 1913. Should such incapacity extend beyond a period of two weeks, compensation shall begin on the fifteenth day after the injury; provided, however, that if the [fol. 106] period of incapacity extends beyond the thirty-fifth day following the date of the injury, then the compensation for the fifth week of incapacity shall be increased by adding thereto an amount equal to two-thirds (2/3) of the weekly compensation; if the period of incapacity extends beyond the forty-second (42) day following the date of the injury, then the compensation for the sixth week of incapacity shall be increased by adding thereto an amount equal to two-thirds (2/3) of the weekly compensation; if the period of incapacity extends beyond the forty-ninth (49) day following the date of the injury, then the compensation for the seventh week of incapacity shall be increased by adding thereto an amount equal to two-thirds (2/3) of the weekly compensation; if the period of incapacity extends beyond the forty-ninth (49) day following the date of the injury, then the compensation thereafter shall be only the weekly compensation provided for in this law.

(h) For injury producing temporary disability, sixty per cent of the average weekly wages received at the time of the injury, subject to a maximum compensation of fifteen dollars and a minimum of six dollars per week; provided, that if at the time of injury the employe receives wages less than six dollars per week, then he shall receive the full amount of wages per week. This compensation shall be paid during the period of such disability, not, however, beyond three hundred weeks.

(i) For disability total in character and permanent in quality, sixty per cent of the average weekly wages received at the time of the injury, subject to a maximum compensation of fifteen dollars [fol. 107] per week, and a minimum of six dollars per week, provided that if at the time of injury, the employe receives wages less than six dollars per week, then he shall receive the full amount of wages per week. This compensation shall be paid during the period of such disability, not, however, beyond four hundred weeks.

(j) For disability partial in character and permanent in quality, the compensation shall be as follows:

For all cases included in the following schedule, compensation shall be paid as follows, to-wit:

(1) For the loss of a thumb, Sixty per cent of daily wages during forty weeks.

(2) For the loss of a first finger, commonly called the index finger, sixty per cent of daily wages during thirty weeks.

(3) For the loss of a second finger, sixty per cent of daily wages during twenty-five weeks.

(4) For the loss of a third finger, sixty per cent of daily wages during twenty weeks.

(5) For the loss of a fourth finger, commonly called the little finger, sixty per cent of daily wages for fifteen weeks.

(6) For the loss of the first phalange of the thumb or of any finger shall be considered to be equal to the loss of one-half of such thumb or finger and compensation shall be one-half of the amounts above specified.

(7) The loss or more than one phalange shall be considered as the loss of the entire finger or thumbs; provided, however, that in no case shall the amount received for more than one finger exceeded [fol. 108] the amount provided in this schedule for the loss of a hand.

(8) For the loss of a great toe, sixty per cent of daily wages during twenty-five weeks.

(9) For the loss of one of the toes other than the great toe, sixty per cent of daily wages during fifteen weeks.

(10) For the loss of the first phalange of any toe, shall be considered to be equal to the loss of one-half of such toe and the compensation shall be one-half of the amount above specified.

(11) The loss of more than one phalange shall be considered as the loss of the entire toe.

(12) For the loss of a hand, sixty per cent of daily wages during one hundred fifty weeks.

(13) The loss of two-thirds of that part of an arm between the shoulder joint and the elbow joint shall constitute the loss of an arm, and the compensation therefore shall be sixty (60 per cent) of the average weekly wages during two hundred twenty-five (225) weeks.

(14) For the loss of a foot, sixty per cent of daily wages during one hundred twenty-five weeks.

(15) The loss of two-thirds of that part of a leg between the hip joint and the knee joint shall constitute the loss of a leg, and the compensation therefor shall be sixty (60 per cent) per cent of the average weekly wages during two hundred (200) weeks.

(16) For the loss of an eye, sixty per cent of daily wages during one hundred weeks.

(a) For the loss of a second or last eye, the other eye having been lost prior to the injury resulting in the loss of the second eye, [fol. 109] sixty (60 per cent) per cent of the average weekly wages during two hundred (200) weeks.

(17) For the loss of hearing in one ear, sixty (60) per cent of daily wages during fifty (50) weeks, and for the loss of hearing

in both ears, sixty (60) per cent of the daily wages during one hundred fifty (150) weeks.

(18) The loss of both arms, or both hands, or both feet, or both legs, or both eyes, or of any two thereof caused by a single accident, shall constitute total and permanent disability, to be compensated according to the provisions of section twenty-four hundred seventy-seven m-9 (i) (2477-m-9-i), supplement of the code, 1913.

(19) In all other cases in this, clause (j), the compensation shall bear such relation to the amount stated in the above schedule as the disability bears to those produced by the injuries named in the schedule. Should the employe and employer be unable to agree upon the amount of compensation to be paid in cases not specifically covered by the schedule, the amount of compensation shall be settled according to provisions of this act as in other cases of disagreement.

(20) The amounts specified in this, clause (j) and subdivisions thereof, shall be subject to the same limitations as to maximum and minimum weekly payments as are stated in clause (h), section ten (nine) hereof.

Sec. 2477-m10. Death—Payment of Unpaid Balance.—Where an employe is entitled to compensation under this act for an injury received and death ensues from any cause not resulting from the injury for which he was entitled to the compensation, payments of [fol. 110] the unpaid balance for such injury shall cease and all liability therefor shall terminate.

Sec. 2477-m11. Examination of Injured Employe—Suspension of Compensation.—After an injury, the employe, if so requested by his employer, shall submit himself for examination at some reasonable time and place within the state and as often as may be reasonably requested, to a physician or physicians authorized to practice under the laws of this state, without cost to the employe; but if the employe request, he shall, at his own cost, be entitled to have a physician or physicians of his own selection present to participate in such examination. The refusal of the employe to submit to such examination shall deprive him of the right to compensation during the continuance of such refusal. When a right to compensation is thus suspended no compensation shall be payable in respect to the period of suspension.

Sec. 2477-m12. Contributions from Employes—No Reduction of Employer's Responsibility.—The compensation herein provided shall be the measure of the responsibility which the employer has assumed for injuries or death that may occur to employes in his employment subject to the provisions of this act, and it shall not be in any wise reduced by contribution from employes.

Sec. 2477-m13. Trustees for Minors and Those Mentally Incapacitated—Reports.—When an injured minor, employe or a minor dependent or one physically or mentally incapacitated from earning

is entitled to compensation under this act, payment shall be made to a trustee appointed by the judge of the district court for each county in the respective judicial districts, and the money coming into [fol. 111] the hands of the said trustees shall be expended for the use and benefit of the person entitled thereto under the direction and orders of the judge during term time or in vacation. The trustee shall make annual reports to the court of all money or property received and expended for each person, and for services rendered as trustee shall be paid such compensation by the county as the court may direct by written order directed to the auditor of the county who shall issue a warrant therefor upon the treasurer of the county in which the appointment is made. If the judge making the appointment deems it advisable, a trustee may be appointed to serve for more than one county in the district and the expenses shall be paid ratably by each county according to the amount of work performed in each county. The trustee shall qualify and give bond in such amount as the judge may direct, which may be increased or diminished from time to time as the court may deem best. In case a deceased employe for whose injury or death compensation is payable leaves surviving him an alien dependent or dependents residing outside the United States, the consul-general, consul, vice-consul or consular agent of the nation of which the said dependent or dependents are citizens shall be regarded as the exclusive representative of such dependent or dependents. Such consular officer, or his duly appointed representative residing in the State of Iowa, shall have the exclusive right in behalf of such non-resident dependent or dependents to present, prosecute, litigate, adjust and settle all claims for compensation provided by this act and to receive for distribution [fol. 112] to such dependent or dependents all compensation arising thereunder.

Such consular officer or his duly appointed representative shall file with the industrial commissioner a copy of his exequatur or evidence of his authority and the industrial commissioner shall notify such consular officer or his said representative of the death of all employes leaving alien dependent or dependents residing in the country of said consular officer so far as the same shall come to his knowledge, provided, however, that nothing herein shall abridge the right of any relative of such decedent who may reside in the State of Iowa to take out administration upon the estate of such decedent, and as such receive the funds due said estate; and provided further that before said consular agent or his representative shall have the right to receive funds due the estate of said decedent he shall regularly take out administration in the county where decendent last resided, and give bond as administrator for the protection of such funds as provided by law.

Sec. 2477-m14. Commutation of Future Payments—Discretion of Court.—In any case where the period of compensation can be determined definitely either party may, upon due notice to the other, apply to any judge of the district court for the county in which

the accident occurred for an order commuting further payments to a lump sum; provided, however, that no judge of the district court shall consider any such application until there is endorsed thereon by the Iowa Industrial Commission his approval of such commutation, and no order shall be issued by such judge contrary to the endorsement of said Industrial Commissioner. And such judge may [fol. 113] make such an order when it shall be shown to his satisfaction that the payment of a lump sum in lieu of future monthly or weekly payments, as the case may be, will be for the best interest of the person or persons receiving or dependent upon said compensation, or that the continuance of periodical payments will, as compared with lump sum payments, entail undue expense or undue hardship upon the employer liable therefor. Where the commutation is ordered, the court shall fix the lump sum to be paid at an amount which will equal the total sum of the probable future payments capitalized at their present value and upon the basis of interest, calculated at five per cent per annum. Upon the payment of such amount the employer shall be discharged from all further liability on account of such injury or death, for which said compensation was being paid, and be entitled to a duly executed release, upon filing which the liability of such employer under any agreement, award, finding or judgment shall be discharged of record.

Sec. 2477-m15. Schedule of Computation.—The basis for computing compensation provided for in this act shall be as follows:

(a) The compensation shall be computed on the basis of the annual earnings which the injured person received as salary, wages or earnings in the employment of the same employer during the year next preceding the injury.

(b) Employment by the same employer shall be taken to mean employment by the same employer in the grade in which the employe was employed at the time of the accident, uninterrupted by [fol. 114] absence from work due to illness or any other unavoidable cause.

(c) The annual earnings, if not otherwise determinable, shall be regarded as three hundred times the average daily earnings in such computation.

(d) If the injured person has not been engaged in the employment for a full year immediately preceding the accident, the compensation shall be computed according to the annual earnings which persons of the same class in the same or in neighboring employments of the same kind have earned during such period. And if this basis of computation is impossible, or should appear to be unreasonable, three hundred times the amount which the injured person earned on an average of those days when he was working during the year next preceding the accident, shall be used as a basis for the computation.

(e) In case of injured employes who earn either no wages or less than three hundred times the usual daily wage or earnings of

the adult day laborer in the same line of industry of that locality, the yearly wage shall be reckoned as three hundred times the average daily local wages of the average wage earner in that particular kind or class of work; or if information of that class is not obtainable, then of the class or kindred or similarity in the same general employment in the same neighborhood.

(f) As to employes employed in a business or enterprise which customarily shuts down and ceases operation during a season of each year, the number of working days which it is the custom of such [fol. 115] business or enterprise to operate each year shall be used instead of three hundred as a basis for computing the annual earnings, provided the minimum number of days which shall be used as a basis for the year's work shall not be less than two hundred.

(g) Earnings, for the purpose of this action, shall be based on the earnings for the number of hours commonly regarded as a day's work for that employment, and shall exclude overtime earnings. The earnings shall not include any sum which the employer has been accustomed to pay the employe to cover any special expense entailed on him by the nature of the employment.

(h) In computing the compensation to be paid to any employe who, before the accident for which he claims compensation, was disabled and drawing compensation under the terms of this act, the compensation for each subsequent injury shall be apportioned according to the proportion of incapacity caused by the respective injuries which he may have suffered.

Sec. 2477-m 16. Terms Defined.—In this act unless the context otherwise requires:

(a) "Employer" includes and applies to any person, firm, association or corporation, and includes state, counties municipal corporations, cities under special charter and under commission form of government and shall include school districts and the legal representatives of a deceased employer. Whenever necessary to give effect to section seven of this act it includes a principal or intermediate contractor.

(b) "Workman" is used synonymously with "employe," and means any person who has entered into the employment of, or works [fol. 116] under contract of service, express or implied, or apprenticeship for an employer, except a person whose employment is purely casual or not for the purpose of the employer's trade or business or those engaged in clerical work only, but clerical work shall not include one who may be subjected to the hazards of the business, or one holding an official position or standing in a representative capacity of the employer, or an official elected or appointed by the state, county, school district, municipal corporation, cities under special charter and commission form of government; provided that one who sustains the relation of contractor with any person, firm, association, corporation or the state, county, school district, municipal

corporation, cities under special charter or commission form of government, shall not be considered an employe thereof.

The term "workman" shall include the singular and plural of both sexes. Any reference to a workman who has been injured shall, where the workman is dead, include a refrence to his dependants as herein defined, legal representatives or where the workman is a minor or incompetent to his guardian or next friend.

(c) The following shall be conclusively presumed to be wholly dependent upon a deceased employe:

(1) The surviving spouse, unless it be shown that the survivor wilfully deserted deceased without fault upon the part of the deceased; and if it be shown that the survivor deserted deceased without fault upon the part of deceased, the survivor shall not be regarded as a dependent in any degree. No surviving spouse shall [fol. 117] be entitled to the benefits of this act unless she shall have been married to the deceased at the time of the injury, and should the deceased employe leave no dependent children, and should the surviving spouse remarry, then all compensation payable to her shall terminate on the date of such remarriage.

(2) A child or children under sixteen years of age (and over said age if physically or mentally incapacitated from earning) whether actually dependent for support or not upon the parent at the time of his or her death.

(3) A parent of a minor entitled to the earnings of the employe at the time when the injury occurred, subject to provisions of subdivision (f), section ten (nine) hereof.

(4) If the deceased employe leaves dependent surviving spouse, the full compensation shall be paid to such spouse; but if the dependent surviving spouse dies before payment is made in full, the balance remaining shall be paid to the person or persons wholly dependent, if any, share and share alike. If there be no person or persons wholly dependent, then payment shall be made to partial dependents.

(5) In all other cases, questions of dependency in whole or in part shall be determined in accordance with the fact as the fact may be at time of the injury; and in such other cases if there is more than one person wholly dependent, the death benefit shall be equally divided among them, and persons partially dependent, if any, shall receive no part thereof. If there is no one wholly dependent and more than one person partially dependent the death benefit shall be divided among them according to the relative extent of their [fol. 118] dependency. Provided, however, that when a lump sum is paid as contemplated by this act, the court or commissioner, in making distribution thereof, shall take into consideration the contingent rights of partial beneficiaries or the rights of those who may become such after a wholly dependent child or children become sixteen years of age.

(6) Step-parents shall be regarded in this act as parents.

(7) Adopted child or children or step-child or children shall be regarded in this act the same as if issue of the body.

(d) "Injury" or "personal injury" includes death resulting from injury.

(e) The words "personal injury arising out of and in the course of such employment" shall include injuries to employes whose services are being performed on, in or about the premises which are occupied, used or controlled by the employer, and also injuries to those who are engaged elsewhere in places where their employer's business requires their presence and subjects them to dangers incident to the business.

(f) The words "injury" and "personal injury" shall not include injury caused by the wilful act of a third person directed against an employe for reasons personal to such employe or because of his employment.

(g) They shall not include a disease except as it shall result from the injury.

(h) The word "court" whenever used in this act unless the context shows otherwise, shall be taken to mean the district court.

Sec. 2477-m17. Insurance Against Compensation Prohibited—[fol. 119] Penalty.—(a)—Any contract of employment, relief benefit or insurance or other device whereby the employe is required to pay any premiums for insurance against the compensation provided for in this act shall be null and void; and any employer withholding from the wages of any employe any amount for the purpose of paying any such premium shall be guilty of a misdemeanor and punishable by a fine not less than ten dollars nor more than fifty dollars for each offense, in the discretion of the court.

No employe or beneficiary shall have power to waive any of the provisions of this act in regard to the amount of compensation which may be payable to such employe or beneficiary hereunder to whom the act applies.

Sec. 2477-m18. Contract Respecting Claim for Injury Deemed Fraudulent.—Any contract or agreement made by any employer or his agent or attorney with any employe or any other beneficiary of any claim under the provisions of this act within twelve days after the injury shall be presumed to be fraudulent.

Sec. 2477-m20. Attorney's Lien—Subject to Approval.—No claim of an attorney at law for services in securing a recovery under this act shall be an enforceable lien thereon unless the amount of the same be approved in writing by a judge of a court of record or the Iowa Industrial Commissioner, which approval may be made in term time or vacation.

Sec. 2477-m21. Applicable to Intrastate and Interstate Commerce.—The provisions of this act shall apply to employers and em-

ployes as defined in this act engaged in intra-state commerce and [fol. 120] also those engaged in inter-state or foreign commerce for whom a rule or method of compensation has been or may be established by the Congress of the United States, only to the extent that their mutual connection with intra-state work or foreign commerce shall be clearly separable and distinguishable from inter-state or foreign commerce; provided, that any such employer and workman of such employer working only in this state may, subject to the approval of the Iowa Industrial Commissioner, and so far as not forbidden by any act of congress or permitted, voluntarily by written agreement, accept and become bound by the provisions of this act in like manner and with the same force and effect in every respect as by this act provided for other employers and employes.

Part II

Sec. 2477-m22. Iowa Industrial Commissioner—Appointment—Term.—There is hereby created the office of Iowa industrial commissioner, to be appointed by the governor, by and with the consent of the senate. The term of office of the commissioner shall be six years. An appointment may be made to fill a vacancy or otherwise when the senate is not in session, but shall be acted upon at the next session thereof.

The Iowa industrial commissioner shall appoint a deputy, for whose acts he shall be held responsible, who shall hold office during the pleasure of said industrial commissioner. Such appointment shall be made in writing, and must be approved by the executive [fol. 121] council of the State of Iowa. The deputy, in the absence or disability of the Iowa industrial commissioner, shall have all the powers and perform all of the duties of the industrial commissioner pertaining to his office, and shall receive an annual salary of twenty-four hundred dollars, payable in equal monthly installments, out of the state treasury and in same manner as are the salaries of other state officials.

Sec. 2477-m23. Salary — Expenses — Office—Seal—Assistants—Accounts—Political Activity—Annual Appropriation. The salary and actual necessary expenses of the commissioner shall be paid by the state, and he shall be provided with adequate and necessary office rooms, furniture, equipment, supplies and other necessaries in the transaction of the business. The annual salary of the commissioner shall be thirty-three hundred dollars. The commissioner, by and with the consent of the executive council, may fix the salary and appoint a secretary and other assistants and clerical help as may be required and needed, provided, that the salary of the secretary shall not exceed eighteen hundred dollars per annum. The salary and actual personal expense account of the commissioner shall be itemized and sworn to and filed as other current bills as provided by statute, and warrant therefor shall be issued by the auditor upon the treasurer of the state for the payment thereof at the end of each calendar month; provided, however, that the expense account may

be audited, allowed and paid at the end of each week. The commissioner shall provide himself with a seal, which shall be used to [fol. 122] authenticate his orders, decisions and other proceedings deemed necessary, upon which shall be inscribed the words "Iowa Industrial Commissioner's Seal" and the date of organization. All other accounts made by, through or under the commissioner for salaries (and) expenditures, unless otherwise by this act provided, shall be itemized and sworn to by the parties entitled thereto, audited by the commissioner, attested by the secretary, filed as other bills are required by statute, and a warrant shall issue therefor by the auditor of state upon the treasurer, who shall pay the same out of the funds appropriated for the use of the commissioner as by this act provided. The salaries of all persons under the commissioner shall be audited, allowed and paid at the end of each month, and expense accounts may be audited, allowed and paid at the end of each week. The commissioner shall have the power to remove the secretary or any other person appointed to an office by him at any time the commissioner may see fit.

It shall be unlawful for any appointee by the commissioner to expouse the election or appointment of any candidate for or to any political office, or contribute to the campaign fund of any political party, or to the campaign fund of any person who is a candidate for election or appointment to any political office, and any person performing the duties as an appointee under the commissioner violating the provisions of this act shall be sufficient cause for dismissal and removal from office.

Before entering upon his duties the commissioner shall qualify by taking the oath of his office, that he will support the constitution [fol. 123] of the United States and of the state of Iowa, and will faithfully and impartially, without fraud, fear or favor, discharge the duties of his office incumbent upon him, as provided by the law of the state of Iowa, to the best of his ability and understanding.

There is hereby appropriated out of any money not otherwise appropriated for the use of the commissioner, as contemplated within the terms of this act or acts amendatory thereof, or other statutes relating to the commissioner, his duties and responsibilities empowered by law, the sum of twenty-thousand dollars annually, and in addition thereto the executive council shall provide and furnish the commissioner with such printing as may be necessary in the transaction of the business within the contemplation of the law.

Sec. 2477-m24. Powers—Rules—Witnesses—Reports.—The commissioner may make rules and regulations not inconsistent with this act for carrying out the provisions of the act. The employer shall furnish upon request of an injured employe or dependent or any legal representative acting for such person, a statement of the earnings, wages, or salary and other matters relating to such earnings, wages, or salary during the year or part of the year that such employe was in the employment of such employer for the year preceding the injury. Provided, however, that not more than one report shall be required for each on account of any one injury. Process and pro-

cedure under this act shall be as summary as reasonably may be. While sitting as an arbitration committee, or when conducting a hearing upon review, or in the making of any investigation or in- [fol. 124] quiry, neither the commissioner nor the arbitration committee shall be found by common law or statutory rules of evidence, or by technical or formal rules of precedure, but may hold such arbitrations or conduct such hearings and make such investigations and inquires in the manner best suited to ascertain the substantial rights of the parties. The commissioner shall have the power to subpœna witnesses, administer oaths and to examine such books and records of the parties to a proceeding or investigation as relate to questions in dispute or under investigation. The fees for attending as a witness before the industrial commissioner shall be one dollar and fifty cents per diem; for attending before an arbitration committee, one dollar per diem; in both cases five cents per mile for traveling to and from the place of hearing. The district court is hereby empowered to enforce by proper proceedings the provisions of this section relating to the attendance and testimony of witnesses and the examination of books and records. The deposition of any witnesses may be taken and used as evidence in any hearing pending before a board of arbitration in workmen's compensation proceeding in connection herewith. That such deposition shall be taken in the same manner as provided for the taking of depositions in the district court, and when so taken shall be admissible in evidence in such hearings in the same manner subject to the same rules governing the admission of evidence in the district court. Application for permission to take depositions in such case shall be filed in the district court of the county wherein the case for arbitration shall be [fol. 125] heard. The commissioner shall make biennial reports to the governor who shall transmit the same to the general assembly, in which, among other things, the commissioner shall recommend such changes in the law covered by this act as he may deem necessary.

Sec. 2477-m25. Compensation Agreements—Approval.—If the employer and the employe reach an agreement in regard to the compensation under this act, a memorandum thereof shall be filed with the Iowa industrial commissioner by the employer or employe, and unless the commissioner shall, within twenty days, notify the employer and employe of his disapproval of the agreement by registered letter sent to their addresses as given on the memorandum filed, the agreement shall stand as approved and be enforceable for all purposes under the provisions of this act. In case the injured employe is a minor, either he or the trustee provided for in section, twenty-four hundred seventy-seven-m-13 (2477-m-13), supplement to the code, 1913, may execute the memorandum of agreement provided for herein, and may give a valid and binding release for the compensation paid on his account under the terms of this act. Such agreement shall be approved by said commissioner only when the terms conform to the provisions of this act.

Sec. 2477-m26. Committee of Arbitration.—If the employer and the injured employe or representatives or dependents fail to reach

an agreement in regard to compensation under this act, either party may notify the industrial commissioner, who shall thereupon call for the formation of a committee of arbitration. The arbitration [fol. 126] committee shall consist of three persons, one of whom shall be the industrial commissioner who shall act as chairman. The other two shall be named, respectively, by the two parties. If a vacancy occurs it shall be filled by the party whose representative is unable to act.

Sec. 2477-m27. Oath of Arbitrators.—The arbitrators appointed by the parties shall be sworn by the chairman to take the following oath:

I, —— ——, do solemnly swear (or affirm) that I will faithfully perform my duties as arbitrator and will not be influenced in my decision by any feeling of friendship or partiality toward either party.

(Signed) —— ——.

Sec. 2477-m28. Appointment of Arbitrators.—It shall be the duty of the industrial commissioner, upon notification that the parties have failed to reach an agreement, to request both parties to appoint their respective representatives on the committee of arbitration. The commissioner shall act as chairman, and, if either party does not appoint its member on this committee within seven days after notification as above provided, or after a vacancy has occurred, the commissioner shall fill the vacancy and notify the parties to that effect.

Sec. 2477-m29. Powers of Committee—Hearings—Decisions.—The committee of arbitration shall make such inquiries and investigations as it shall deem necessary. The hearings of the committee shall be in the city, town or place where the injury occurred, if within the state. If the injury occurred outside this state the hearings of the committee shall be held in the county seat of this state [fol. 127] which is nearest to the place where the injury occurred unless the interested parties and the Iowa Industrial Commissioner mutually agree by written stipulation that the same may be held at some other place. The decision of the committee, together with the statement of evidence submitted before it, its findings of fact, rulings of law and any other matters pertinent to questions arising before it shall be filed with the Industrial Commissioner. Unless a claim for review is filed by either party within five days from the date of filing the decision with said Commissioner, such decision shall be enforceable under the provisions of this chapter.

Sec. 2477-m30. Examination by Physician—Fee—Evidence.—The industrial commissioner may appoint a duly qualified impartial physician to examine the injured employe and make report. The fee for this service shall be five dollars, to be paid by the industrial commissioner, together wth traveling expenses, but the commissioner may allow additional reasonable amounts in extraordinary cases. Any physician so examining any injured employe shall not be prohibited from testifying before the Iowa industrial commissioner or any other person, commission or court, as to the results of his examination or the condition of the injured employe.

Sec. 2477-m31. Compensation of Arbitrators—Costs.—The arbitrators named by or for the parties to the dispute shall each receive five dollars as a fee for his services, but the industrial commissioner may allow additional reasonable amounts in extraordinary cases. The fees shall be paid by the employer who may deduct an amount equal [fol. 128] to one-half of the sum from any compensation found due the employe. And all other costs incurred in the hearing before the board of arbitration shall be taxed to the losing party, or an equitable apportionment made thereof by the committee according to the facts.

Sec. 2477-m32. Review—Second Hearing.—If a claim for review is filed, the industrial commissioner shall hear the parties and may hear evidence in regard to any or all matters pertinent thereto and may revise the decision of the committee in whole or in part, or may refer the matter back to the committee for further findings of fact, and shall file its decision with the records of the proceedings and notify the parties thereof. No party shall as a matter or right be entitled to a second hearing upon any question of fact.

Sec. 2477-m33. Any party in interest may present a certified copy of an order or decision of the commissioner, or an award of an arbitration committee from which no claim for review has been filed within the time allowed therefor, or a memorandum of agreement approved by the commissioner, and all papers in connection therewith, to the district court of the county in which the injury occurred, whereupon said court shall render a decree in accordance therewith and notify the parties. Such decree, in the absence of an appeal from the decision of the industrial commissioner, shall have the same effect and in all proceedings in relation thereto shall thereafter be the same as though rendered in a suit duly heard and determinated by said court. Upon the presentation to the court of a certified copy of a decision of the industrial commissioner, ending [fol. 129] diminishing or increasing a weekly payment under the provisions of this act, the court shall revoke or modify the decree to conform to such decision.

No order or award of an arbitration committee is appealable direct to the courts, but if any party in interest is aggrieved thereby, he may within five (5) days from the date thereof apply to the industrial commissioner for a review of the same by such industrial commissioner in the manner as hereinbefore provided. If any such party is aggrieved by reason of an order or decree of the Iowa industrial commissioner, such party may appeal therefrom to the district court of Iowa, only in the manner and upon the grounds following:

Within thirty (30) days from the date of such order or decree of the industrial commissioner, the party aggrieved may file an application in writing with the Iowa industrial commissioner asking for an appeal from such order or decree, stating generally the grounds upon which such appeal is sought. In the event such application is filed as hereinbefore provided, the industrial commissioner shall, within thirty days from the filing of same, cause certified copies of all documents and papers then on file in his office

in the matter, and a transcript of all testimony taken therein, to be transmitted with his findings and order or decree to the clerk of the district court of Iowa in and for that county wherein the injury occurred. The application for such appeal may thereupon be brought on for hearing before said district court upon such record by either party on ten (10) days' written notice to the other; sub-
[fol. 130] ject, however, to the provisions of law for a change of the place of trial or the calling of another judge. The findings of fact made by the industrial commissioner within his powers shall, in the absence of fraud, be conclusive, but upon such hearing the court may confirm or set aside such order or decree of the industrial commissioner, if he finds:

(1) That the industrial commissioner acted without or in excess of his powers; or

(2) That the order or decree was procured by fraud; or

(3) That the facts found by the industrial commissioner do not support the order or decree.

(4) That there is not sufficient competent evidence in the record to warrant the industrial commissioner in making the order or decree complained of.

No order or decree of the industrial commissioner shall be set aside by the court upon other than the grounds just stated.

Upon the setting aside of any such order or decree, the court may recommit the controversy to the industrial commissioner for further hearing or proceedings, or it may enter the proper judgment upon the findings, as the nature of the case may demand. Such decree shall have the same effect and in all proceedings in relation thereto shall thereafter be the same as though rendered in a suit duly heard and determined by said court. An abstract of the judgment entered by the trial court upon the appeal from any order or decree shall be made by the clerk thereof upon the docket entry of any judgment which may hereinbefore have been rendered upon it. Such order or decree and transcript of such abstract may thereupon be
[fol. 131] obtained for like entry upon the dockets of the courts of other counties within the state.

Any party in interest who is aggrieved by a judgment entered by the district court upon the appeal of an order or decree, may appeal therefrom within the time and in the manner provided for in appeal from the orders, judgments and decrees of the district court of Iowa; but all such appeals shall be placed on the calendar of the supreme court and brought to a hearing in the same manner as criminal causes on such calendar.

No fee shall be charged by the clerk of any district court for the performance of any official service required by this act, except for the docketing of judgments and for certified copies or transcripts thereof. In proceeding on appeal from an order or decree, costs as between the parties shall be allowed or not, in the discretion of the court.

Sec. 2477-m34. Review of Payment—Notice.—(a) Any payment required to be made under this act, which has not been commuted, may be reviewed by the industrial commissioner at the request of the employer or of the employe, and if on such review the commissioner finds the condition of the employe warrants such action, he may end, diminish or increase the compensation, subject to the maximum or minimum amounts provided for in this act. All hearings upon review of the Iowa industrial commissioner under the provisions of this section, or under section twenty-four hundred seventy-seven-m 32 (2477-m-32), supplement to the code, 1913, shall be held at Des Moines, Iowa, unless the interested parties and the Iowa industrial commissioner mutually agree by written stipulation that the same may be held at some other place.

[fol. 132] Upon the presentation to the court of a certified copy of a decision of the industrial commissioner ending, diminishing or increasing a weekly payment under the provisions of this act, the court shall revoke or modify any judgment or decree then on record in his court to conform to such decision.

(b) Any notice to be given by the commissioner or court provided for in this act shall be in writing but service thereof shall be sufficient if registered and deposited in the mail, addressed to the last known address of the parties.

Sec. 2477-m35. Fees Subject to Approval.—Fees of attorneys and physicians for services under this act shall be subject to the approval of the industrial commissioner unless otherwise provided in this act.

Sec. 2477-m36. Reports by Employers—Records—Inspection.—Every employer shall hereafter keep a record of all injuries, fatal or otherwise, sustained by his employes in the course of their employment and resulting in incapacity for a longer period than one day. Within forty-eight hours, not counting Sundays and legal holidays, after the employer has knowledge of the occurrence of an accident resulting in personal injury causing incapacity for a longer period than one day, a report shall be made in writing by the employer to the industrial commissioner on blanks to be procured from the commissioner for that purpose.

Upon the termination of the disability of the injured employe, or if such disability extends beyond a period of sixty days, at the expiration of such period, the employer shall make a supplemental [fol. 133] report on blanks to be procured from the commissioner for that purpose. The said reports shall contain the name and nature of the business of the employer, the location of the establishment, the name, age, sex and occupation of the injured employe, and shall state the date and hour of the accident, the nature and cause of the injury, and such other information as may be required by the commissioner. Any employer who refuses or neglects to make the report required by this section shall be punished by a fine of not more than fifty dollars for each offense.

All books, records and pay rolls of the employers, coming under this act showing or reflecting in any way upon the amount of wage

expenditure of such employer, shall always be open for inspection by the industrial commissioner, or any of his representatives presenting a certificate of authority from said commissioner for the purpose of ascertaining the correctness of the wage expenditure; the number of men employed and such other information as may be necessary for the uses and purposes of the commissioner in his administration of the law. But information obtained within the contemplation of this act shall be used for no other purpose than the information of the commissioner or insurance association with reference to the duties imposed upon such commissioner. A refusal on the part of the employer to submit his books, records or pay rolls for the inspection of the commissioner, or his authorized representatives presenting written authority from the commissioner, shall subject the employer to a penalty of one hundred dollars for each such offense, to be collected by civil action in the name of the state, and paid into the state treasury.

[fol. 134] Sec. 2477-m37. Political Activity and Contributions Prohibited—Penalty.—It shall be unlawful for the commissioner, during his term of office, to serve upon any committee of any political party or espouse the election or appointment of any person for any political office or contribute to any campaign fund of any political party, or to the campaign fund of any person who is a candidate for election or appointed to any political office. A violation of this section shall be deemed a misdemeanor and upon conviction shall be fined one hundred dollars.

Sec. 2477-m38. Candidate for Commissioner—Political Promises Prohibited—Penalty.—It shall be unlawful for any person who is a candidate for the appointment as commissioner to make any promise to another, expressed or implied, in consideration of any assistance or influence given or recommendation made that the candidate will, if appointed as commissioner, vote to appoint such person or one whom he may recommend to an office within the power of the commissioner to appoint. A violation thereof shall be deemed a misdemeanor and upon conviction thereof shall be fined one hundred dollars.

Sec. 2477-m39. Recommendations of Candidates to be in Writing—Record—Public Inspection—Financial Interest Prohibited—Penalty.—All recommendations made by any person to the commissioner asking the appointment of another as commissioner shall be reduced to writing signed by the person presenting the same, which shall be filed by the governor in his office and open at all reasonable times for public inspection, and all recommendations [fol. 135] made by any person to the commissioner for the appointment of another within the power of the commissioner to appoint, shall be reduced to writing, signed by the person presenting the same and filed by the commissioner and open for public inspection at all reasonable times and hours. If any person recommending the appointment of another within the contemplation of this act refuse to reduce the same to writing, it shall be the duty of the person to

whom the recommendation is made, to make a brief memorandum thereof, stating the name of the person recommended and the name of the person who made the same, which shall be filed as by this act in other cases provided. It shall be unlawful for the commissioner to be financially interested in any business enterprise coming under or affected by this act during his term of office, and if he offend this statute, it shall be sufficient grounds for his removal from office and in such case the governor shall at once declare the office vacant and appoint another to fill the vacancy.

Sec. 2477-m40. Removal from Office—Filing of Charges—Executive Council Shall Hear.—The governor shall remove from office the commissioner on the grounds of inefficiency, neglect of duty, or malfeasance in office, upon written charges having been filed with the executive council and sustained by proofs; but written notice of such charges, together with a copy thereof, shall be served upon the accused ten days before the time fixed for hearing. The executive council shall have jurisdiction to hear the case, and shall make such finding in accordance with justice and the law. The finding shall be reduced to writing, and report and finding filed with the governor.

[fol. 136] Part III

Sec. 2477-m41. Insurance of Liability.—Every employer, subject to the provisions of this act, shall insure his liability thereunder in some corporation, association or organization approved by the state department of insurance. Every such employer shall within thirty days after this act goes into effect exhibit on demand of the state insurance department evidence of his compliance with this section; and if such employer refuses or neglects to comply with this section, he shall be liable in case of injury to any workman in his employ under the common law as modified by statute, and in the same manner and to the same extent as though such employer had legally exercised his right to reject the compensations provisions of chapter eight-a (8-a), title XII, supplement to the code, 1913.

Any employer who fails to insure his liability as required herein shall post and keep posted a sign of sufficient size and so placed as to be easily seen by his employes in the immediate vicinity where working, which sign shall read as follows:

Notice to Employes

You are hereby notified that the undersigned employer has failed to insure his liability to pay compensation as required by law, and that because of such failure he is liable to his employes in damages for personal injuries sustained by his employes in the same manner and to the same extent as though he had legally exercised his right to reject the compensation provisions of chapter eight-a (8-a), title [fol. 137] XII, supplement to the code, 1913.

(Signed) —— ——.

Any employer coming under the provisions of this act who fails to comply with this section or to post and keep posted the above notice in the manner and form herein required shall be guilty of a misdemeanor.

Sec. 2477-m42. Mutual Companies—Conditions.—For the purpose of complying with the foregoing section, groups of employers by themselves or in an association with any or all of their workmen, may form insurance associations as hereafter provided, subject to such reasonable conditions and restrictions as may be fixed by the state insurance department and membership in such mutual insurance organization as approved, together with evidence of the payment of premiums due, shall be evidence of compliance with the preceding section.

Sec. 2477-m43. Benefit Insurance—Approval.—Subject to the approval of the Iowa Industrial Commissioner, any employer or group of employers may enter into or continue an agreement with his or their workmen to provide a scheme of compensation, benefit or insurance in lieu of the compensation and insurance provided by this act; but such scheme shall in no instance provide less than the benefits here secured, nor vary the period of compensation provided for disability or for death, or the provisions of this act with respect to periodic payments, or the percentage that such payments shall bear to weekly wages, except that the sums required may be increased; [fol. 138] provided, further that the approval of the Iowa Industrial Commissioner shall be granted, if the scheme provides for contribution by workmen, only when it confers benefits in addition to those required by this act commensurate with such contributions.

Sec. 2477-m44. Certificate of Approval.—Whenever such scheme or plan is approved by the Iowa Industrial Commissioner, he shall issue a certificate to that effect, whereupon it shall be legal for such employer, or group of employers, to contract with any or all of his or their workmen to substitute such scheme or plan for the provisions of this act during a period of time fixed by said department.

Sec. 2477-m45. Termination—Appeal to District Court.—Such scheme or plan may be terminated by the Iowa Industrial Commissioner on reasonable notice to the interested parties if it shall appear that the same is not fairly administered, or if its operation shall disclose latent defects threatening its solvency, or if for any substantial reason it fails to accomplish the purpose of this act, but from any such order of said Iowa Industrial Commissioner the parties affected, whether employer or workmen, may upon the giving of proper bond to protect the interests involved, appeal for equitable relief to the district court of this state.

Sec. 2477-m46. Maximum Commission or Compensation for Reinsurance.—No insurer of any obligation under this act shall either by himself or through another, either directly or indirectly, charge or accept as a commission or compensation for placing or renewing [fol. 139] any insurance under this act more than fifteen per cent of the premium charged.

Sec. 2477-m47. Policy Requirements.—Every policy issued by any insurance corporation, association or organization to assure the payment of compensation under this act shall contain a clause providing that between any employer and the insurer, notice to and knowledge of the occurrence of injury or death on the part of the insured shall be notice and knowledge on the part of the insurer; and jurisdiction of the insured for the purpose of this act shall be jurisdiction of the insurer and the insurer shall be bound by every agreement, adjudgment, award or judgment rendered against the insured.

Sec. 2477-m48. Insolvency Clause Prohibited—Lien of Insured.—No policy of insurance issued under this act shall contain any provision relieving the insurer from payment if the insured becomes insolvent or discharged in bankruptcy during the period that the policy is in operation, or the compensation, or any part of it, is due and unpaid. Every policy shall provide that the workman shall have a first lien upon any amount becoming due on account of such policy to the insured from the insurer, and that in case of the legal incapacity, inability or disability of the insured to receive the amount due and pay it over to the insured workman, or his dependents, said insurer shall pay the same directly to such workman, his agent, or to a trustee for him or his dependents, to the extent of discharging any obligation of the insured to said workman or his dependents.

[fol. 140] Sec. 2477-m49. Proof of Solvency—Revocation of Approval.—Where an employer coming under this act furnishes proofs to the insurance department satisfactory to the insurance department and Iowa Industrial Commissioner, of such employer's solvency and financial ability to pay the compensation and benefits as by this act provided and to make such payments to the parties when entitled thereto, or when such employer deposits with such insurance department security satisfactory to such insurance department and the Iowa Industrial Commissioner as will secure the payment of such compensation such employer shall be relieved of the provisions of section forty-two of this act; provided that such employer shall from time to time, as may be required by such insurance department and Iowa Industrial Commissioner, furnish such additional proof of solvency and financial ability to pay as by this section of this act provided.

The insurance department and Iowa Industrial Commissioner may, at any time, upon reasonable notice to such employer and upon hearing, revoke for cause any order or approval theretofore made, as by this act provided and within the contemplation of this section.

[fol. 141] DEFENDANT'S EXHIBIT "D"

Schendel vs. C. P. & R. I.

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

Mrs. C. Y. HOPE, Claimant,

vs.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Defendant

Certificate

To the District Court of Iowa in and for Lucas County:

I, A. B. Funk, Industrial Commissioner of Iowa, hereby certify, that Exhibit "A" is a true and correct copy of the Application of the Chicago, Rock Island and Pacific Railway Company for Arbitration in the above entitled case which was filed in my office on March 2nd, 1923.

That Exhibit "B" is a true and correct copy of the Answer filed by the respondent, Mrs. C. Y. Hope, in connection with the above entitled case in the office of the Iowa Industrial Commissioner on March 9th, 1923.

That Exhibit "C" is a true and correct copy of Applicant's Desig- [fol. 142] nation of an Arbitrator, which was filed with Deputy Industrial Commissioner Young in connection with the above entitled case at the time of the arbitration hearing on March 20th, 1923.

That Exhibit "D" is a true and correct copy of the Arbitration Committee's Findings for Defendant, which was filed in the office of the Iowa Industrial Commissioner in connection with the above entitled case on March 23rd, 1923.

That Exhibit "E" is a true and correct copy of a letter received from Davis & Michel, attorneys representing the respondent in the above entitled case and filed in the office of the Iowa Industrial Commissioner on March 27th, 1923 giving notice of appeal from the award of the arbitration committee.

That Exhibit "F" is a true and correct copy of the Decision in Review which was filed by the Iowa Industrial Commissioner in connection with the above entitled case on May 9th, 1923.

That Exhibit "G" is a true and correct copy of the Notice of Appeal which was filed by the appellant in the office of the Iowa Industrial Commissioner in connection with the above entitled case on May 17th, 1923.

That Exhibit "H" is the transcript of the evidence which was taken at the time of the arbitration hearing in connection with the above entitled case and filed in the office of the Iowa Industrial Commissioner, including Exhibits "1" to "7" inclusive which were introduced into the record.

That all of the foregoing mentioned exhibits are attached hereto,

forming a complete and correct copy of the record in the above en-
[fol. 143] titled case as it now appears in the files of the Iowa Industrial Commissioner.

Signed this 19th day of May, 1923.

A. B. Funk, Iowa Industrial Commissioner.

EXHIBIT "A" TO DEFENDANT'S EXHIBIT "D"

State of Iowa Workmen's Compensation Service

Application of the Chicago, Rock Island & Pacific Railway Company for Arbitration in the Matter of C. Y. Hope, Deceased

To A. B. Funk, Industrial Commissioner of the State of Iowa:

You are hereby notified that on or about the 4th day of February, 1923, one C. Y. Hope, then an employe of the Chicago, Rock Island & Pacific Railway Company, received injuries while acting within the scope of his employment from which he shortly thereafter died. That by reason of the nature of the employment of said decedent, this applicant, The Chicago, Rock Island & Pacific Railway Company, his employer, has become liable as it verily believes, for the payment of compensation to the dependents of the said C. Y. Hope, deceased. That said decedent left surviving him a widow, Mrs. C. Y. Hope, who resides at Chariton, Iowa, and as this applicant is advised, two or more dependent step-children. That this applicant, the [fol. 144] employer of said decedent, has failed to reach an agreement in regard to compensation with the persons entitled thereto.

Wherefore, your applicant prays that the surviving spouse of said decedent, to-wit: Mrs. C. Y. Hope, be required to answer this application for arbitration. That a time and place be fixed for hearing thereon, and due notice thereof be given, and that upon such hearing an order or award be made such as is proper in the premises.

Dated this 2nd day of March, A. D. 1923, at Des Moines, Iowa.

The Chicago Rock Island & Pacific Railway Company, by J. G. Gamble, R. L. Read, Its Attorneys.

EXHIBIT "B" TO DEFENDANT'S EXHIBIT "D"

Workmen's Compensation Service

Application of the Chicago, Rock Island & Pacific Railway Company for Arbitration in the Matter of C. Y. Hope, Deceased

Answer to Petition for Arbitration

To the Iowa Industrial Commissioner:

The respondent above named for answer to plaintiff's petition respectfully states:

Now comes Mrs. C. Y. Hope and respectfully alleges and states:

[fol. 145] I

That she is the surviving widow of the above named decedent, C. Y. Hope.

II

That her right and claim of action against the Chicago, Rock Island & Pacific Railway Company for damages growing out of the death of said C. Y. Hope while employed by said Chicago, Rock Island & Pacific Railway Company is wholly governed by the laws of the United States and especially the Federal Employers' Liability Law; and that at the time of the injuries resulting in his death of said C. Y. Hope was engaged as an employee of the Chicago, Rock Island & Pacific Railway company, was an interstate carrier engaged in interstate commerce, and said decedent was working and engaged in interstate commerce as such employee at said time. That because of said facts the Workmen's Compensation Act of Iowa has no application to and does not govern any rights of Mrs. C. Y. Hope.

Wherefore the respondent prays relief as follows:

That your commissioner adjudge that decedent and his employer were engaged in Interstate Commerce at the time of his injuries, and that therefore no relief granted herein.

Dated at ——, Iowa, this 8th day of March, 1923.

(Signed) Mrs. C. Y. Hope, Respondent. Davis & Michel, 419 Met. Bk. Bldg., Minneapolis, Minn.

[fol. 146] Exhibit "C" to Defendant's Exhibit "D"

Iowa Workmen's Compensation Service

Before the Arbitration Committee Organized under the Provisions of the Iowa Workman's Compensation Law

The Chicago, Rock Island and Pacific Railway Company, Applicant,

vs.

Mrs. Jessie Hope, Surviving Widow of C. Y. Hope, Deceased, Respondent

Applicant's Designation of an Arbitrator

Comes now the applicant and designates A. E. Hollingsworth as its arbitrator as a member of the Arbitration Committee provided for by the Iowa Workmen's Compensation Act.

The Chicago, Rock Island & Pacific Railway Company.

(Signed) J. G. Gamble, J. A. Penick, A. B. Howland, Its Attorneys.

[fol. 147] EXHIBIT "D" TO DEFENDANT'S EXHIBIT D

Mrs. C. Y. HOPE, Claimant,

vs.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY CO., Defendant

Arbitration Committee Findings for Defendant

The undersigned, Ralph Young, A. E. Hollingsworth and I. L. Guernsey being the Committee of Arbitration duly constituted in the case of Mrs. C. Y. Hope vs. C. R. I. & P. R. R. Co., pursuant to the provisions of Chapter 147, Acts of the Thirty-fifth General Assembly of Iowa, being duly sworn and having held a session beginning on the 20th March, 1923 at Chariton, Iowa and having heard the testimony and arguments offered, do hereby adjudge and announce the following decision:

Findings

1. That on February 4th, 1923 C. Y. Hope was in the employ of the Chicago, Rock Island and Pacific Railway Co. as a freight conductor.

2. That on February 4th, 1923 while C. Y. Hope was engaged in taking his train from Pershing, Ia., to Chariton, Ia. which train at [fol. 148] the time consisted of engine and caboose only, such train was struck by a passenger train and in resulting wreck the said C. Y. Hope suffered fatal injuries.

3. That such fatal injuries suffered by the said C. Y. Hope arose out of and in the course of his employment by the Chicago, Rock Island and Pacific Railway Co.

4. That at the time of his fatal injuries the deceased was not engaged in interstate commerce.

5. That by reason of the findings set out in Paragraph 4, the case is governed by the provisions of the Iowa Workmen's Compensation Law.

6. That by reason of the findings set out in Paragraph 3, the widow of the deceased is entitled to recovery under the Iowa Workmen's Compensation Law.

7. Wherefore the Chicago, Rock Island and Pacific Railway Co. is hereby ordered to pay Mrs. C. Y. Hope compensation under the Iowa Workmen's Compensation Law at the rate of $15.00 a week for 300 weeks, starting as of the date of death. The Chicago, Rock Island and Pacific Railway Co. is also ordered to pay the statutory medical, surgical and hospital and burial benefits and to pay the costs of this hearing.

Signed at Chariton, Ia., this 20th day of March, 1923.
(Signed) Ralph Young, A. E. Hollingsworth, I. L. Guernsey, Committee of Arbitration.

[fol. 149] EXHIBIT "E" TO DEFENDANT'S EXHIBIT "D"

Copy

Law Offices of Davis & Michel, 419 Metropolitan Bank Bldg., Suite 419-423, Minneapolis, Minn.

March 26th, 1923.

Ralph Young, Deputy Industrial Commissioner, Des Moines, Iowa.

DEAR SIR:

Will you kindly have a copy of the evidence in the case of Hope Estate vs. C. R. I. & P. Ry. Co., sent to us, upon which the decision in this matter was based.

We wish to appeal from the award made by your board and will have proper papers filed with you.

Upon receipt of your bill, we will mail you check.

Very truly yours, (Signed) Davis & Michel.

eam-ch.

[fol. 150] EXHIBIT "F" TO DEFENDANT'S EXHIBIT "D"

Before the Iowa Industrial Commissioner

Mrs. C. Y. HOPE, Claimant,

vs.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Defendant

In Review

Arbitration in this case was instituted by The Chicago, Rock Island & Pacific Railway Company, for the purpose of determining whether or not the same is subject to adjustment under the Iowa Workmen's Compensation Statute.

Application for arbitration was filed with this department March 2, 1923.

A copy of this application was mailed to Mrs. C. Y. Hope at Chariton, March 2, 1923.

March 16, 1923, a letter was received at this department from Davis & Michel, of Minneapolis, Minnesota, attorneys for this claimant, acknowledging receipt of a copy of said application.

March 9, 1923, there was filed with the department by Davis & Michel, an answer to the petition for arbitration.

[fol. 151] Abitration proceedings was by the commissioner scheduled to occur at Chariton, March 20th, 1923 of which due notice was given to all concerned.

Hearing was held in accordance with this notice, Failing to appear and to appoint a member of the arbitration committee, the vacancy was filled by the deputy commissioner as provided by Section 2477-m23, Supplement to the Code of 1913. Whereupon the committee proceeded to arbitrate issues involved, as appears in the transcript of evidence included in this report.

The finding of the arbitration committee is as follows:

1. That on February 4th, 1923, C. Y. Hope was in the employ of the Chicago, Rock Island and Pacific Railway Company as a freight conductor.

2. That on February 4th, 1923, while C. Y. Hope was engaged in taking his train from Pershing, Iowa, to Chariton, Iowa, which train at the time consisted of engine and caboose only, such train was struck by a passenger train and in resulting wreck the said C. Y. Hope suffered fatal injuries.

3. That such fatal injuries suffered by the said C. Y. Hope arose out of and in the course of this employment by the Chicago, Rock Island and Pacific Railway Company.

4. That at the time of his fatal injuries the deceased was not engaged in interstate commerce.

5. That by reason of the findings set out in Paragraph 4. the case is governed by the provisions of the Iowa Workmen's Compensation Law.

[fol. 152] 6. That by reason of the findings set out in Paragraph 3, the widow of the deceased is entitled to recovery under the Iowa Workmen's Compensation Law.

7. Wherefore, The Chicago, Rock Island and Pacific Railway Company is hereby ordered to pay Mrs. C. Y. Hope compensation under the Iowa Workmen's Compensation Law at the rate of $15.00 per week for 300 weeks, starting as of the date of death. The Chicago, Rock Island and Pacific Railway Company is also ordered to pay the statutory, medical, surgical and hospital and burial benefits and to pay the costs of this hearing.

Following is a copy of a communication received from Davis & Michel, Attorneys for Mrs. C. Y. Hope, dated March 26, 1923:

Minneapolis, Minn.

Mr. Ralph Young, Deputy Industrial Commissioner, Des Moines, Iowa.

DEAR SIR:

In re Hope vs. C. R. I. & P.

We were unable to appear at the above matter when it was held that decedent was not engaged in interstate commerce. Is it possi-

ble under your practice, to have a rehearing of this matter to give us an opportunity to be present.

Please let us hear from you regarding this.

Very truly yours, Davis & Michel.

In our record also appears as of same date a second letter from claimant's counsel, the body of which is as follows:

Will you kindly have copy of the evidence in the case of Hope [fol. 153] vs. C. R. I. & P. Ry. Co., sent to us, upon which the decision in this matter was based.

We wish to appeal from the award made by your board and will have proper papers filed with you.

Upon receipt of your bill, we will mail check.

March 27, 1923, counsel for claimant was advised by the Industrial Commissioner of the receipt of the letter just quoted, together with the information that this letter would be accepted as notice of claimant's appeal from the decision of the arbitration committee, and that the transcript had been duly only ordered for them as directed in correspondence.

April 24, 1923, notice was given by the commissioner to all parties concerned that review proceeding under the notice of appeal by claimant would occur at the department, May 4, 1923, at 9 A. M.

Under date of April 27, 1923, Davis & Michel advised the Industrial Commissioner of receipt of notice of review proceeding.

The only issue involved in this case is as to whether or not the time of his accidental death, February 4, 1923, C. Y. Hope, husband of this claimant, was engaged in interstate commerce.

Facts developed at the arbitration hearing are substantially as follows:

On the day of his accidental death and for some time previously the deceased was in the employ of the Chicago, Rock Island & Pacific Railway Company as conductor on what is known as a mine-run train, the principal business of which is to haul coal cars to and from what is known as Pershing Siding on its main line along a [fol. 154] spur track leading off of the main line to mines owned and operated by the defendant company.

From the record it would appear that early in the forenoon of February 4th, a train was made up and delivered at Pershing consisting of cars consigned to inter-state and intra-state points. Later in the forenoon a second train was delivered at Pershing consisting wholly of cars consigned to Valley Junction and Allerton, both points intrastate in character.

February 4th fell on Sunday. It would appear to have been the custom of the company to take the engine and caboose under the direction of Conductor Hope to the town of Chariton in order that the train crew might have Sunday dinner with their families living at Chariton, and incidentally to take water for the engine. While proceeding under this arrangement on Sunday, February 4th, a collision with a train on the main line resulted in the death of the conductor.

The last haul of this crew and equipment before the accident was intra-state—cars billed to Allerton and Valley Junction.

According to the record the freight transportation next to follow in afternoon was not within the knowledge of the train men as orders for further service were to be received. While not absolutely controlling, these facts are significant in that they further remove the situation at the time of the accident from the range of inter-state commerce. But the vital fact is as to whether or not at the time of this collision the deceased conductor was engaged in intra-state employment within the meaning of the statute.

At this time the equipment in charge of Mr. Hope was in service [fol. 155] incidental to employment, but was not specifically related to transportation inter or intra-state in character. It had no direct contact with its regular employment of coal hauling. Its mission at that particular time was simply and solely to deliver the train crew to Chariton in accordance with the Sunday custom.

These facts distinctly separate the deceased from inter-state relationship and logically and legally link him with intra-state service. The fact that the engine was to take water at Chariton is merely incidental and by no means serves to establish the character of employment.

In Smith vs. Interurban Railway Company, 171 N. W. 134, the Supreme Court of Iowa, speaking through Justice Stevens, delivers opinion bearing upon this situation in reversing the district court and sustaining this department in holding for the widow. In that case an interurban conductor was accidentally killed in the terminal yards at Des Moines while settling his motor and caboose into quarters for the night, immediately following distinct contact with interstate transportation.

This opinion states that "Unless there was some intervening service not directly or immediately connected with inter-state commerce so as substantially to form a part or necessary incident thereof, plaintiff cannot recover." The court held from the facts submitted that "there was some intervening service not directly or immediately connected with inter-state commerce" though but a few minutes previously there was distinct contact with inter-state traffic.

The court seems to give some weight to the fact that the lines of [fol. 156] the defendant company are wholly within the state and that "primarily its business was intra-state." It will be observed, however, that in the case at bar employment at the time of the accident was much more definitely removed from the range of inter-state commerce.

In this opinion Justice Stevens quotes approving from the decision of the Supreme Court of the State of Illinois in Illinois C. R. vs. Behrens, 233 U. S. 473, 34 Sup. Ct. 646, 58 L. Ed 1051, Ann. Cas. 19140, 163 as follows:

"Here at the time of the fatal injury the inter-state was engaged in moving several cars, all loaded with intra-state freight, from one part of the city to another. That was not a service in interstate commerce, and so the injury and resulting death were not within the statute. That he was expected, upon the completion of that task,

to engage in another which would have been a part of interstate commerce is immaterial under the statute; for by its terms the true test is the nature of the work being done at the time of the injury."

This reasoning distinctly classifies the case at bar in intrastate relationship.

The court also quotes from a decision of the Supreme Court of the United States in Erie R. R. Co. vs. Welsh, 242 U. S. 303, Sup. Ct. 116,661 L. Ed. 319:

"It was in evidence also that the orders plaintiff would have received, had he not been injured on his way to the yardmaster's office, would have required him immediately to make up an interstate train. Upon the strength of this it is argued that this act at the moment of his injury partook of the nature of the work, he would have [fol. 157] been called upon to perform. In our opinion, this view is untenable. By the terms of the Employers' Liability Act, the true test is the nature of the work being done at the time of the injury, and the mere expectation that plaintiff would presently be called upon to perform a task in interstate commerce is not sufficient to bring the case within the act. And this depends upon whether the series of acts that he had last performed was properly to be regarded as a succession of separate tasks or as a single and individual task. It turns upon no interpretation of the act of Congress, but involved simply an appreciation of the testimony and admissible inferences therefrom in order to determine whether there was a question to be submitted to the jury as to the fact of employment in interstate commerce. The state courts held there was no such question, and we cannot say that in so concluding they committed manifest error. It results that, in the proper exercise of the jurisdiction of this court in cases of this character the decision ought not to be disturbed."

The decision of the arbitration committee is affirmed.

Dated at Des Moines, Iowa, this 9th day of May, 1923.

A. B. Funk, Iowa Industrial Commissioner. (Seal.)

[fol. 158] EXHIBIT "G" TO DEFENDANT'S EXHIBIT "D"

Before the Industrial Commissioner of Iowa

In the Matter of the Award of Compensation on Account of the Death of C. Y. Hope, Deceased

Mrs. C. Y. HOPE, Widow and Appellant,

vs.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Applicant for Arbitration and Appellee

Notice of Appeal from Commissioner's Order of Affirmance of Arbitrator's Finding and Award

Comes now Mrs. C. Y. Hope and appeals unto the District Court of Lucas County from the finding and award of the arbitrators as affirmed by the Industrial Commissioner in the above entitled matter.

The above appeal will come on for hearing at the July, 1923, term of said court, and at a time to be hereafter fixed by the court.

Of all of which notice will be taken by the commissioner and the Chicago, Rock Island & Pacific Railway Company.

Dated at Des Moines, Iowa, this May 17, 1923.

Davis & Michel, R. M. Haines, Attorneys for Appellant.

Service of the above notice is accepted and receipt of copy is ac-[fol. 159] knowledged at Des Moines, Iowa, at the hour of 3:30 o'clock P. M., this May 17, 1923.

J. G. Gamble, R. L. Read, A. B. Howland, Attorneys for C., R. I. & P., Industrial Commissioner.

EXHIBIT "H" TO DEFENDANT'S EXHIBIT "D"

IN THE DISTRICT COURT OF IOWA IN AND FOR LUCAS COUNTY

In the Matter of the Award of Compensation on Account of the Death of C Y. Hope, Deceased

Mrs. C. Y. HOPE, Appellant,

vs.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Appellee

Notice of Hearing Before the District Court on Appeal from the Industrial Commissioner's Decision

To Mrs. C. Y. Hope, plaintiff and appellant, or to Davis & Michel and R. M. Haines, her attorney of record:

You, and each of you, are hereby notified that the application for [fol. 160] appeal from the findings and award of the Iowa In-

dustrial Commissioner in the above entitled matter will come on for hearing before the District Court of Lucas County, Iowa, at the Court House at Chariton, Iowa, on the 2nd day of June, 1923, at 2 o'clock p. m. before the Honorable Francis M. Hunter, presiding judge of said court.

All of which you will take due notice and govern yourselves accordingly.

The Chicago, Rock Island & Pacific Railway Company, Employer and Appellee, by J. G. Gamble, R. L. Read, A. B. Howland, Its Attorneys.

Service of the above notice is hereby accepted and receipt of copy thereof acknowledged on this 23rd day of May, 1923.

Davis & Michel, R. M. Haines.

[fol. 161] IN THE DISTRICT COURT OF IOWA IN AND FOR LUCAS COUNTY

In the Matter of the Award of Compensation on Account of the Death of C. Y. Hope, Deceased

Mrs. C. Y. HOPE, Appellant,

vs.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Appellee

Order

Now on this 24th day of May, 1923, it appearing to the court that ten days' notice of hearing on the appeal has been served upon counsel for the appellant, which notice designates the time for hearing as June 2nd, 1923, at 2 o'clock p. m. at the Court House at Chariton, Lucas County, Iowa, it is ordered by the court that said appeal shall be and the same is hereby set down for hearing at said time and place.

F. M. Hunter, Judge.

[fol. 162] EXHIBIT TO DEFENDANT'S EXHIBIT "D"

IN THE DISTRICT COURT OF THE STATE OF IOWA IN AND FOR LUCAS COUNTY

In the Matter of the Award of Compensation on Account of the Death of C. Y. Hope, Deceased

Mrs. C. Y. HOPE, Appellant,

vs.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Appellee

Decree and Judgment Entry

Now on this 2nd day of June, 1923, being one of the regular judicial days of the April, 1923 term of this court, this matter comes

on for hearing on the appeal of Mrs. C. Y. Hope, from the findings and order of the Industrial Commissioner of the State of Iowa, the Chicago, Rock Island & Pacific Railway Company appeared by Jas. A. Penick and A. B. Howland, its attorneys, and the appellant appeared not, and the Court having examined the transcript of the proceedings before the Arbitration Committee, and the decision of the Iowa Industrial Commissioner on review, and being now fully advised in the premises, finds that the Court has jurisdiction over the subject matter of this action; that the parties duly appeared before the Arbitration Committee as provided by law and before the Iowa Industrial Commissioner that ten days' notice in writing [fol. 163] was given to the attorney of record for Mrs. C. Y. Hope, appellant of this hearing, and that the Court has jurisdiction over the parties hereto.

The Court further finds that Mrs. C. Y. Hope, appellant, is the surviving widow of C. Y. Hope, deceased; that the said C. Y. Hope came to his death on account of injuries sustained by him while employed by the Chicago, Rock Island & Pacific Railway Company; and that such injuries arose out of the course of his employment; that the said C. Y. Hope was not at the time of his death engaged in interstate commerce, and that Mrs. C. Y. Hope, as the surviving widow of the said decedent, is entitled to an award of compensation under the Iowa Workmen's Compensation law at the rate of $15 per week for the statutory period of 300 weeks.

The Court further finds that the decision of the Arbitration Committee and the Iowa Industrial Commissioner, is regular and the decision of the said Arbitration Committee and Industrial Commissioner is supported by the evidence adduced upon the hearing before the Arbitration Committee.

It is, therefore, ordered, adjudged and decreed by the Court that the award of the Arbitration Committee and the decision of the Iowa Industrial Commissioner be and the same hereby is approved and confirmed in all respects. That Mrs. C. Y. Hope have and recover of the appellee, the Chicago, Rock Island & Pacific Railway Company, judgment in the sum of $4,500, payable at the rate of $15 per week commencing at the date of the death of the decedent, to-wit February 13, 1923, unless the said Mrs. C. Y. Hope shall die [fol. 164] before the expiration of 300 weeks, in which event said compensation shall be payable to the surviving dependents of the said decedent, if any.

And it is further ordered, adjudged and decreed that Mrs. C. Y. Hope have and recover of the Chicago, Rock Island & Pacific Railway Company the sum of $100 for medical and surgical services rendered the deceased prior to his death, and the further sum of $100 for funeral expenses of the said decedent in accordance with the terms of the original award by the Arbitration Committee.

(Signed) F. M. Hunter, Judge.

Plaintiff excepts.

June 2nd, 1923.

Certificate of Transcript

STATE OF IOWA,
Lucas County, ss:

I, J. L. Hendrickson, Clerk of the District Court of the State of Iowa, in and for said county, do hereby certify, that the foregoing is a true and perfect transcript of the record in the case of Mrs. C. Y. Hope vs. Chicago, Rock Island & Pacific Railway Company as certified by the Industrial Commissioner of Iowa excepting the Transcript of Testimony and Exhibits before the Arbitration Committee and the Record in said cause in the District Court and the judgment entered therein on June 2nd, 1923, as fully as the same [fol. 165] remains on file and of record in my office, and I further certify that said judgment has been entered in the Index of Liens.

In witness whereof, I have hereunto set my hand, and affixed the seal of said Court, at my office, in Chariton, in said county, this 2nd day of June, A. D. 1923.

J. L. Hendrickson, Clerk. (Seal.)

STATE OF IOWA,
Second Judicial District,
Lucas County, ss:

I, F. M. Hunter, one of the Judges of the Second Judicial District of the State of Iowa, and which is composed of the Counties of Walpello, Lucas, Davis in said State of Iowa, do hereby certify that J. L. Hendrickson whose signature is appended to the foregoing certificate, is, and was at the time of signing same, the Clerk of said Court in and for the County of Lucas, and the legal custodian of the files and records thereof; and his signature thereto appended is genuine, and that said attestation is in due form of law.

Dated at Chariton, Iowa, this 2nd day of June, A. D. 1923.

F. M. Hunter, Judge of the Second Judicial District of Iowa.

[fol. 166] STATE OF IOWA,
Lucas County, ss:

I, J. H. Hendrickson, Clerk of the District Court in and for said county, do hereby certify that F. M. Hunter, whose name appears to the foregoing certificate dated the 2nd day of June, A. D. 1923, is now and was at the date thereof, an acting Judge of the District Court in and for said county, duly elected and qualified in conformity with the laws of the state; and that his signature is genuine. And I further certify that the Court of which I am Clerk is a Court of Record using a seal of office, and this certificate is in conformity with the laws of said State.

In witness whereof, I have hereunto set my hand and caused the seal of the Court to be hereto affixed at my office in Chariton, in said county, this 2nd day of June in the year of our Lord, 1923.

J. L. Hendrickson, Clerk of the District Court. (District Court Seal.)

Defendant's Exhibit E.
Schendel vs. C., R. I. & P. R. R. Co.
3-4-24.

[fol. 167] DEFENDANT'S EXHIBIT "E"

Administrator's Petition and Bond

Copy

STATE OF IOWA,
Polk County, ss:

IN THE DISTRICT COURT OF SAID COUNTY, IN VACATION

In the Matter of the Estate of CLARENCE Y. HOPE, Deceased

Petition

To the Honorable District Court of said County:

Comes now Hazel H. Hope a resident of said county, and respectfully represents that on or about the 13th day of February, A. D. 1923, Clarence Y. Hope of said county, died intestate, leaving at the time of his death the following heirs, to-wit: Hazel H. Hope, daughter, and having at the time of death personal property in this state, which may be lost, destroyed or diminished in value if speedy care be not taken of the same. To the end therefore that said property and debts may be collected and preserved, I respectfully request the appointment of E. R. Byess with full power and authority to act as Administrator herein according to law. The total value of real and personal property is about $250.00.

Hazel H. Hope.

Subscribed and sworn to by Hazel H. Hope before me March 10th, 1923. John D. Dennison, Notary Public. (Seal.)

[fol. 168] STATE OF IOWA,
County of Polk, ss:

I, E. R. Byess do solemnly swear that I will well and truly administer all and singular the goods, chattels, rights, credits and effects of Clarence Y. Hope, deceased, and pay all just claims and charges against his estate, so far as his assets shall extend, and that I will perform all other acts now or hereafter required by law to the best of my knowledge and ability.

E. R. Byess.

Subscribed and sworn to before me by E. R. Byess, this 10th day of March, A. D. 1923. John D. Dennison, Notary Public. (Seal.)

Copy of Administrator's Bond

American Surety Company of New York

Capital: $5,000,000

Know all men by these presents: that we, E. R. Byers as principal, and the American Surety Company of New York, as surety, are held and firmly bound unto the County of Lucas and State of Iowa, in the penal sum of Five Hundred and no-100 ($500.00) Dollars, for the payment of which, well and truly to be made, we bind ourselves, our heirs and successors firmly by these presents.

The condition of the above bond is such, that if the above bound E. R. Byers who has been appointed Administrator of the estate of Clarence Y. Hope, deceased, will render a true account of his office [fol. 169] and of his doings therein to the proper authority, when required thereby or by law; that he will promptly pay over to the officer entitled thereto all moneys or property which may come into his hands by virtue of his office; that he will promptly account for all balances of money remaining in his hands, at the termination of his office; that he will exercise all reasonable diligence and care in the preservation and lawful disposal of all moneys, books, papers, securities or other property appertaining to his said office, and deliver them to his successor, or to any other person authorized to receive the same; and that he will faithfully and impartially, without fear, favor, fraud, or oppression discharge all duties now or hereafter required of his office by law; and the sureties on such bond shall be liable for all moneys or property that may come into the hands of such officer at any time during his possession of such office, then the above obligation is to be void and of no effect, otherwise to be and remain in full force and virtue in law.

Witness our hands, this 10th day of March, A. D. 1923.

E. R. Byers, Principal. American Surety Company of New York, by R. W. Clearman, Resident Vice-President.

Attest: L. H. Hopson, Resident Assistant Secretary.

The above bond was approved and filed this 12th day of March, 1923.

J. L. Hendrickson, Clerk of District Court. (Seal.)

[fol. 170] State of Iowa,
Polk County, ss:

I, E. R. Byers, do solemnly swear that I will truly, faithfully and honestly discharge all the duties and perform all the trusts committed to my care as the Administrator of the estate of Clarence Y. Hope, late of Chariton, Iowa, Lucas County, deceased, so help me God.

E. R. Byers.

Sworn and subscribed to before me this 10th day of March, A. D. 1923. R. W. Clearman, Notary Public. (Seal.)

In the District Court of said County, in Vacation

No. 3292

In the Estate of Clarence Y. Hope, Deceased

Copy of Letters

State of Iowa,
Lucas County, ss:

To all to whom these presents shall come, Greeting:

Know yet that, whereas, Clarence Y. Hope, late of the aforesaid county and state, died intestate on or about the 13th day of February, A. D. 1923, having at the time of his decease personal property in this state which may be lost, destroyed or diminished in value, if [fol. 171] speedy care be not taken of the same: To the end, therefore, that said property and debts may be collected and preserved, and administered upon as by law required.

Whereas, E. R. Byers, has this day fully complied with the laws and orders of this Court in relation to giving bond and taking the prescribed oath. Now, therefore, know ye, and all to whom it may concern, that the District Court of Lucas County, in vacation, does hereby appoint and commission E. R. Byers Administrator of all and singular the goods, chattels, rights, credits and effects, which belong to said decedent, Clarence Y. Hope, at the time of his decease, with full power and authority to collect and secure the said property and debts, wheresoever the same may be found in this State, and in general to do and perfrom all other acts which now or hereafter may be required of him by law.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court at my office in Chariton, this 12th day of March A. D. 1923.

J. L. Hendrickson, Clerk of District Court, by Mary E. Hendrickson, Deputy. (Seal.)

[fol. 172] Order for Notice of Appointment

State of Iowa,
Lucas County, ss:

Upon consideration hereof, it is hereby ordered and directed by the District Court of said County, that the within named E. R. Byers give notice of his appointment as Administrator of the estate of Clarence Y. Hope, deceased by publishing notice thereof for three consecutive weeks in the Herald Patriot, a newspaper published at Chariton of Lucas County, Iowa.

In testimony whereof, I have hereunto set my hand and cause the seal of said Court to be affixed at Chariton this 12th day of March A. D. 1923.

J. L. Hendrickson, Clerk of District Court, by Mary E. Hendrickson, Deputy. (Seal.)

[fol. 173] Certificate

STATE OF IOWA,
Lucas County, ss:

I, J. L. Hendrickson, Clerk of the District Court of Iowa, in and for said County do hereby certify that Clarence Y. Hope died on or about the 13th day of February A. D. 1923, and E. R. Byers was on the 12th day of March 1923, appointed Administrator of his estate.

I further certify that E. R. Byers is the duly qualified and acting Administrator of the estate of Clarence Y. Hope deceased, at this date of June 2, 1923, as fully as the same appears of record or on file in my office.

In witness whereof, I have hereunto set my hand and affixed the seal of the District Court at my office in Chariton Iowa, this second day of June, 1923.

J. L. Hendrickson, Clerk, by Mary E. Hendrickson, Deputy.
(Seal.)

[fol. 174] Certificate of Transcript

STATE OF IOWA,
Lucas County, ss:

I, J. L. Hendrickson, Clerk of the District Court of the State of Iowa, in and for said County, do hereby certify, that the foregoing is a true and perfect transcript of the Administrator's Petition and "Oath" "Administrator's Bond" Letters and "Order for Notice of Appointment" in the estate of C. Y. Hope, Deceased, as fully as the same remains on and of record in my office:

In witness whereof, I have hereunto set my hand and affixed the seal of said Court, at my office, in Chariton, in said County, this 2nd day of June, A. D. 1923.

J. L. Hendrickson, Clerk. (Seal.)

STATE OF IOWA,
Second Judicial District,
Lucas County, ss:

I, F. M. Hunter one of the Judges of the Second Judicial District of the State of Iowa, and which is composed of the counties of Appanoose, Davis, Jefferson, Lucas, Monroe, Van Buren and Wapello in said State of Iowa, do hereby certify that J. L. Hendrickson whose signature is appended to the foregoing certificate, is, and was at the time of signing the same, the Clerk of said Court in and for the [fol. 175] county of Lucas, and the legal custodian of the files and records thereof; and his signature thereto appended is genuine, and that said attestation is in due form of law.

Dated at Chariton Iowa, this 2nd day of June A. D. 1923.

F. M. Hunter, Judge of the Second Judicial District of Iowa.

STATE OF IOWA,
Lucas County, ss:

I, J. L. Hendrickson, Clerk of the District Court in and for said County, do hereby certify that F. M. Hunter, whose name appears to the foregoing certificate dated the second day of June A. D. 1923, is now, and was at the date thereof, an acting Judge of the District Court in and for said County, duly elected and qualified in conformity with the laws of the State; and that his signature is genuine. And I further certify that the Court of which I am the Clerk is the Court of Record, using a seal of office, and this certificate is in conformity with the laws of said State.

In witness whereof, I have hereunto set my hand and caused the seal of the Court to be hereunto affixed at my office in Chariton, in said County, this 2nd day of June in the year of our Lord, 1923.

J. L. Hendrickson, Clerk.

[fol. 176] DEFENDANT'S EX. F

STATE OF IOWA,
County of Polk, ss:

I, W. G. B., Judge of the District Court of the State of Iowa in and for Polk County do hereby certify that the attached certification and attestation of the petition at law and original notice in the cause of E. R. Byers, Administrator of the Estate of Clarence Y. Hope, deceased, Plaintiff, vs. The Chicago, Rock Island & Pacific Railway Company, Defendant, made by W. D. Baldwin, Clerk of the District Court of the State of Iowa, in and for Polk County, is in due form.

And I do further certify that the said W. D. Baldwin is the Clerk of the District Court of the State of Iowa, in and for Polk County and that he has duly qualified as such Clerk of the District Court of Polk County, Iowa.

In Witness Whereof, I have hereunto set my hand and caused the seal of the District Court of Iowa in and for Polk County, to be hereto affixed this 2nd day of June, 1923.

W. G. B., Judge of the District Court of Iowa in and for Polk County.

[fol. 177] STATE OF IOWA,
County of Polk, ss:

I, W. D. Baldwin, Clerk of the District Court of Polk County, Iowa, do hereby certify that the papers attached hereto are true and correct copies of the petition at law in a cause entitled E. R. Byers, Administrator of the Estate of Clarence Y. Hope, deceased, Plaintiff, vs. The Chicago, Rock Island & Pacific Railway Company, Defendant, No. 33046 Law, and the original notice in the same cause, together with the return of the Sheriff of this County

of the service of said notice as fully as the same remains of record in my office.

And I do further certify that said cause of E. R. Byers, Administrator of the Estate of Clarence Y. Hope, deceased, Plaintiff, vs. The Chicago, Rock Island & Pacific Railway Company is still pending in the District Court of the State of Iowa, in and for Polk County.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the District Court of the State of Iowa in and for Polk County at my office in Des Moines, Iowa, this 2nd day of June, 1923.

W. D. Baldwin, Clerk of the District Court of Iowa in and for Polk County. (Seal.)

[fol. 178] IN THE DISTRICT COURT OF THE STATE OF IOWA IN AND FOR POLK COUNTY, JULY TERM, A. D. 1923

No. 33046. Law

E. R. BYERS, Administrator of the Estate of Clarence Y. HOPE, Deceased, Plaintiff,

vs.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY, Defendant

Petition at Law

Comes now the plaintiff and for cause of action states:

That he is the duly appointed qualified and acting administrator of the Estate of Clarence Y. Hope, deceased.

That the defendant, The Chicago, Rock Island & Pacific Railway Company, is a corporation for pecuniary profit, organized under the laws of the State of Iowa, and is engaged in operating lines of railway through Polk County and through the State of Iowa, and adjoining states, and has been so engaged for five years last past. That said railway is a common carrier engaged in passenger and freight traffic over its said lines.

That on the 4th day of February, 1923, and for several years [fol. 179] prior thereto, Clarency Y. Hope, deceased of whose estate the plaintiff is administrator, was in the employ of said defendant railway company as a conductor of a freight train, which freight train prior to and on said date had been operating on that part of defendant's lines situated in Lucas County, Iowa, and between the town of Chariton on said line and the City of Des Moines, Iowa, and particularly at coal mines located on defendant's lines between said named cities.

That on the 4th day of February, 1923, the said Clarence Y. Hope was in charge of his said freight train and engaged in taking

empty freight cars to mines No. 2 and No. 3 of the Central Iowa Fuel Company located on defendant's spur tracks leading off from defendant's main line in Lucas County, Iowa, and in bringing out loaded cars from said mines to the station known as Pershing, Iowa, on said defendant's main line in Lucas County, Iowa. That the said Clarence Y. Hope and his train crew brought from said mines a train of loaded coal cars on the 4th day of February, 1923, and placed the same on defendant's side tracks at said station of Pershing. That at the station of Pershing there was no agent employed or maintained by the defendant company, and the said Clarence Y. Hope, conductor of said freight train, was required to telephone from the station to train dispatcher at Des Moines, Iowa, for orders and information as to whether defendant's main line railway track between the station of Pershing and the station of Chariton was open for the use of the freight train of said Clarence Y. Hope, conductor, it being the purpose of said Clarence Y. Hope to take his [fol. 180] freight train to Chariton in order that the boiler might be supplied with water, and while the engine was being filled with water the crew were to have their dinner. That the train dispatcher at Des Moines advised the said Clarence Y. Hope over the telephone that the eastward extra train would wait at Chariton until 1:30 P. M. and that all first class trains due at Pershing before 12:10 P. M. had arrived or left. That thereupon the said Clarence Y. Hope left the station of Pershing with his train consisting of engine, tender and caboose, backing on the main line of defendant's track for the City of Chariton at about twelve o'clock noon.

That there is a curve in the main line track of defendant's railway a little ways south of the station of Pershing, and while the freight train of the said Clarence Y. Hope was proceeding southward on the main line track beyond this curve for the station of Chariton it was overtaken by a fast passenger train south bound on said main line track at a point a little beyond said curve, and said fast passenger train collided with the engine of the freight train with great force and violence. That at the time of said collision the said Clarence Y. Hope was in the caboose of the freight train, and the impact of the collision caused the caboose to be detached from the engine and tender, and was driven with great force for a distance of about sixty feet or more where the caboose was thrown from the track and down the embankment, turning over immediately and catching fire and burning up. That the said Clarence Y. Hope, conductor, received severe physical injuries and internal injuries from inhaling smoke and gas, which injuries caused the death of the [fol. 181] said Clarence Y. Hope on the 13th day of February, 1923.

The plaintiff further states that the said Clarence Y. Hope, at the time of said collision and injuries received because of said collision, was engaged in interstate commerce.

That plaintiff further states that between the date of said injury on the 4th day of February, 1923, and the 13th day of February, 1923, the date on which said Clarence Y. Hope died, he suffered and sustained great physical and mental pain and anguish continually on account of said injuries.

The plaintiff further states that the said Clarence Y. Hope, deceased, left surviving him a widow Jessie Hope, and a daughter Hazel Helen Hope, beneficiaries, both of whom he had contributed and was contributing from his earnings and wages earned prior to his death, and the said Jessie Hope, widow, and Hazel Helen Hope, daughter, were dependents upon the said Clarence Y. Hope at the time of his death.

The plaintiff further states that the train dispatcher of the defendant railway company, in stating to the said Clarence Y. Hope, conductor, in effect, that the main railway line of the defendant between Pershing and Chariton was open for the use of said freight train, misled the said Clarence Y. Hope and caused him to leave the station of Pershing for the station of Chariton in the belief that the said main line of defendant's railway between Pershing and Chariton was open to the said Clarence Y. Hope over which he might run his [fol. 182] train without danger of collision with any other train, and the said train dispatcher was negligent in that he did not inform the said Clarence Y. Hope that the South bound passenger train had the right of way between Pershing and Chariton, and the negligence of the said train dispatcher was the negligence of the defendant railway company, and said negligence of the dispatcher and defendant railway company was the direct and proximate cause of the injury to and death of the said Clarence Y. Hope.

The Plaintiff further states that the said Clarence Y. Hope, before and at the time of said collision and injury which followed, was in the exercise of ordinary care for his own protection and did not in any manner or degree contribute to the injuries received by him on account of said collision which resulted in his death.

Wherefore, Plaintiff demands judgment against said defendant, The Chicago, Rock Island & Pacific Railway Company, in the sum of Twenty-five Thousand Dollars, together with interest thereon at the rate of six per cent per annum from the date of the rendition of the verdict herein and for all costs of this action.

Thos. A. Cheshire, Attorney for Plaintiff.

[fol. 183] State of Iowa,
County of Polk, ss:

I, E. R. Byers, being first duly sworn on oath deposes and say that I am plaintiff in the above entitled cause, that I have heard the above and foregoing petition read and believe the statements therein made are true.

E. R. Byers.

Subscribed and sworn to before me and in my presence by the said E. H. Byers, administrator of the estate of Clarence Y. Hope, deceased, this 14th day of May, 1923. Thos. A. Cheshire, Notary Public in and for Polk County, Iowa.

[fol. 184] IN THE DISTRICT COURT OF THE STATE OF IOWA AND FOR POLK COUNTY, JULY TERM, A. D. 1923

E. R. BYERS, Administrator of the Estate of Clarence Y. Hope, Deceased, Plaintiff,

vs.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Defendant

Original Notice

To the Chicago, Rock Island & Pacific Railway Company:

You are hereby notified that on or before the 15th day of May, A. D. 1923, the petition of the plaintiff in the above entitled matter will be filed in the office of the Clerk of the District Court of the State of Iowa, in and for Polk County, Iowa, claiming of you the sum of Twenty-five Thousand ($25,000.00) Dollars, money as justly due from you, and interest thereon at 6 per cent from the — day of the rendition of the verdict, herein, as damages sustained by the wrongful death of Clarence Y. Hope, on account of and because of the negligence of the defendant, The Chicago, Rock Island & Pacific Railway Company.

[fol. 185] NOTICE OF ATTORNEY'S LIEN

To the Chicago, Rock Island & Pacific Railway Company:

You are hereby notified that the undersigned claims an attorney's lien in the sum of Ten Thousand ($10,000.00) Dollars on any money in your hands due or to become due the plaintiff on the claim made by plaintiff in this suit, for services as his attorney in above entitled cause.

You may govern yourself accordingly.

Thos. A. Cheshire.

For further particulars see petition, and unless you appear thereto and defend before noon of the second day of the next term, being the July term of said Court, which will commence at Des Moines, Polk County, Iowa, on the 2nd day of July, 1923 default will be entered against you and judgment and decree rendered thereon.

Dated this 14th day of May, 1923.

Thos. A. Cheshire, Attorney for Plaintiff.

STATE OF IOWA,
Polk County, ss:

Received the within notice this 14th day of May, 1923, and on the 14th day of May, 1923, I personally served the same on the within named defendant, The Chicago, Rock Island & Pacific Railway Co., by offering to read the original to W. H. Heath, freight agent

of said company, which he waived and delivered to him a true copy thereof. All done in Polk County, Iowa.

(Signed) Park A. Findley, Sheriff Polk County, Iowa.
James L. McGuire, Deputy.

[fol. 186] STIPULATION RE EVIDENCE

It is stipulated that the foregoing transcript of testimony, consisting of eighty-eight (88) typewritten pages, together with all original exhibits introduced in evidence and on file with the Clerk of this Court, to-wit: Plaintiff's Exhibits 1, 2 and 3, and Defendant's Exhibits "A" to "F" inclusive, may be by the Court, without notice, signed and allowed as and for the Settled Case herein.

Dated July 14, 1924.

Davis & Michel, Attorneys for Plaintiff. O'Brien, Horn & Stringer, Attorneys for Defendant.

IN DISTRICT COURT OF STEELE COUNTY

ORDER SETTLING CASE

The foregoing transcript, consisting of eighty-eight (88) typewritten pages, having been examined by me and found conformable to the truth, said transcript, together with all original exhibits introduced in evidence and now on file with the Clerk of this Court, to-wit: Plaintiff's Exhibits 1, 2 and 3, and Defendant's Exhibits "A" to "F" inclusive, may be, and the same hereby is signed, settled and allowed as and for the Settled Case herein, as containing all testimony, offers, exhibits, objections, exceptions, motions and rulings, and all other proceedings had or taken at the trial of the above entitled action.

Dated July 14, 1924.

Fred W. Senn, District Judge.

[fol. 187] IN DISTRICT COURT OF STEELE COUNTY

[Title omitted]

VERDICT—March 4, 1924

We, the jury empaneled and sworn in the above entitled action, find for the plaintiff and assess his damages in the sum of $26,047.50, Twenty-six Thousand Forty-seven and 50-100 Dollars.

Dated at Owatonna, Minn., this 4th day of March, A. D. 1924.

John Burrock, Foreman.

[fol. 188] IN DISTRICT COURT OF STEELE COUNTY

[Title omitted]

MOTION FOR JUDGMENT OR A NEW TRIAL

To Davis & Michel, E. S. Cary, and Leach & Leach, attorneys for plaintiff, and to said plaintiff:

SIR: Please take notice, that the defendant moves the Court for an order directing the entry of judgment in favor of the defendant and against the plaintiff, notwithstanding the verdict of the jury herein, and that plaintiff take nothing by this action, on the following grounds:

1. Because, upon the evidence as it stood at the time defendant's motion for a directed verdict in its favor was made, the defendant was entitled to such directed verdict.

2. Because it conclusively appeared from all of the testimony that plaintiff's decedent was, at the time he sustained his injuries resulting in his death, not engaged in interstate commerce, but was on the [fol. 189] contrary engaged in commerce wholly within the state of Iowa, and that the Federal Employers' Liability Act of the United States of April 22nd, 1908, as amended, had, and has no application to this case, but that the rights of the plaintiff and the defendant were, and are, wholly governed by the Workmen's Compensation Act of the state of Iowa.

3. Because it conclusively appeared that the District Court of Lucas County, Iowa, a court of competent jurisdiction of the State of Iowa, had adjudged and decreed that plaintiff's decedent was not, at the time of his injuries, engaged in interstate commerce, but that he was on the contrary, engaged in commerce wholly within the state of Iowa, and that said court had awarded compensation for plaintiff's decedent's injuries and death under the Workmen's Compensation Act of the State of Iowa, and that said judgment of the District Court of Lucas County, Iowa, was and is res adjudicata, and was and is conclusive and binding upon this court under Section 1, of Article IV, of the Constitution of the United States.

4. Because it conclusively appeared that plaintiff was not and is not the "personal representative" of said decedent, Clarence Y. Hope, within the meaning of the Federal Employers' Liability Act of the United States, of April 22nd, 1908, as amended, but that on the contrary the only "personal representative" of said decedent was and is E. R. Byers, the administrator appointed by the District Court of Lucas County, Iowa, where said decedent resided at the time of his death.

5. Because it conclusively appeared that the plaintiff had no title [fol. 190] to the cause of action alleged and set forth in the complaint herein, or right to bring any action upon said alleged cause of action, and that the Federal Employers' Liability Act of the

United States of April 22nd, 1908, as amended, should be so construed.

You will further take notice, that if the Court should not grant, but on the contrary, should deny said defendant's motion for judgment notwithstanding the verdict, then and in that event, the defendant moves the Court for an order vacating and setting aside the verdict of the jury herein, and for a new trial of this action, on the following grounds, viz:

1. Because said verdict is not justified by the evidence.

2. Because said verdict is contrary to law.

3. Because of errors of law occurring at the trial and duly excepted to by the defendant at the time.

4. Because of excessive damages appearing to have been given by the jury under the influence of passion and prejudice.

5. Because of the following errors of law occurring at the trial and herein specially assigned, to-wit:

a. The Court erred in refusing to direct a verdict in favor of the defendant, and against the plaintiff.

b. The Court erred in refusing to hold as a matter of law, that plaintiff's decedent was not engaged in interstate commerce at the time of his injury, and in refusing to hold that plaintiff's decedent was, at the time of his injury, engaged wholly in commerce within the state of Iowa.

[fol. 191] c. The Court erred in submitting to the jury the question of whether plaintiff's decedent was engaged in interstate commerce at the time of his injuries.

d. The Court erred in sustaining plaintiff's objection to the introduction of defendant's Exhibit "C," and in excluding said exhibit from the evidence, said exhibit being an exemplified copy of the Workmen's Compensation Act of the State of Iowa; for the reason that it conclusively appeared that said Workmen's Compensation Act of the State of Iowa governed exclusively the rights of the parties to this action.

e. The court erred in sustaining plaintiff's objection to the introduction of defendant's Exhibit "D," and in excluding said exhibit from the evidence, said "Exhibit "D" being an exemplified copy of the judgment of the District Court of the County of Lucas, Iowa, whereby it was adjudged and decreed that plaintiff's decedent was not at the time of his injury, engaged in interstate commerce, but was on the contrary engaged wholly in commerce within the state of Iowa only, for the reason that said judgment was and is res -judicata and binding upon this Court under Section 1, of Article IV, of the Constitution of the United States, and its exclusion from the evidence deprived this defendant of its rights under said United States Constitution.

f. The Court erred in sustaining plaintiff's objection to the introduction of defendant's Exhibit "E," and in excluding said exhibit from the evidence, said exhibit being an exemplified copy of

letters of administration of the estate of Clarence Y. Hope, deceased, duly issued by the District Court of Lucas County, Iowa to E. R. [fol. 192] Byers, for the reason that said exhibit conclusively showed that plaintiff was not the "personal representative" of said deceased, within the meaning of the Federal Employers' Liability Act of the United States of April 22nd, 1908, as amended.

g. The Court erred in sustaining plaintiff's objection to the introduction of defendant's Exhibit "F," and in excluding said exhibit from the evidence, said exhibit being an exemplified copy of the proceedings in a certain action pending in the District Court of Holt County, Iowa, brought by E. R. Byers, the domiciliary administrator of the estate of Clarence Y. Hope, deceased, duly appointed by the District Court of Lucas County, Iowa, for the reason that such exhibit conclusively shows that the plaintiff had no title to the cause of action set forth in the complaint herein, and had no right to bring any action therefor.

Said motion is made upon all the records and files in this cause, and upon a case to be settled and allowed by the Court

O'Brien, Horn & Stringer, Attorneys for Defendant, 1116 Pioneer Building, St. Paul, Minnesota.

Due and personal service of the within notice of motion is hereby admitted, this 30th day of April, 1924.

The hearing of said motion will be had at the time and place convenient and satisfactory to the Court and counsel, and to be agreed upon. Until the hearing of said motion, it is agreed that all proceedings herein be stayed.

Davis & Michel and E. S. Carey, Attorneys for Plaintiff.

[fol. 193] IN DISTRICT COURT OF STEELE COUNTY

[Title omitted]

ORDER DENYING MOTION FOR JUDGMENT OR A NEW TRIAL

The above entitled matter came on for hearing before the court at Mantorville, Minnesota, on the 14th day of July, 1924, upon the motion of the defendant for an order setting aside the verdict of the jury herein and granting to the defendant judgment as against the plaintiff, or, in the alternative, for an order setting aside the verdict of the jury herein and granting to the defendant a new trial of said cause. O'Brien, Horn & Stringer, Esqs., St. Paul, Minn., appeared for the defendant in support of said motions, and Davis & Michel, Esqs., and E. S. Cary Esq., Minneapolis, Minn., and Leach & Leach, Esqs., Owatonna, Minn., appeared for the plaintiff. The matter was submitted upon a settled case herein, upon all the records and files in said cause and upon the oral arguments and briefs of counsel. After due consideration

It is ordered that said motions be and the same are in all things denied.

Fred W. Senn, District Judge.

[fol. 194] IN DISTRICT COURT OF STEELE COUNTY

MEMORANDUM

This action is brought under the Federal Employers' Liability Act. The plaintiff was the conductor of a work train on defendant's railway engaged in hauling cars in and out of the coal mines near Pershing Siding, Iowa. It was the duty of this crew to place loaded cars for shipment upon the tracks at Pershing Siding in such order that east bound or west bound trains might pick them up and carry them to their destination. At noon on the day of the accident, the switching crew was given permission to proceed to Chariton, Iowa, for dinner and for water over the main line of the defendant railroad. After going into the main line at Pershing Siding the work train was struck by a thru passenger train from Minneapolis to Kansas City going in the same direction. The caboose of the work train was demolished and plaintiff's intestate, Clarence Y. Hope, was killed.

The defendant upon the trial of the case admitted that its negligence was the direct and proximate cause of the collision which resulted in the death of Hope. The work train was given the use of the main line to proceed to Chariton at a time when a thru passenger train had the right of way.

The Court submitted to the jury the question as to whether Clarence Y. Hope and defendant at the time of the collision were engaged in interstate commerce and if they were so engaged then the question of the amount of damages that plaintiff is entitled to recover.

It appears that just prior to the collision plaintiff was engaged in [fol. 195] moving loaded coal cars for interstate shipment. The jury found that Clarence Y. Hope and defendant were as a matter of fact engaged in interstate commerce and returned a verdict for the plaintiff.

The instant case was started in Steele County in February, 1923, thereafter and in March, 1923, the defendant company instituted proceedings before the Industrial Commission of the State of Iowa, which determined the character of Hope's employment and made an award of $15.00 per week for three hundred weeks, payable to decedent's widow. Upon an appeal to the District Court of Iowa, the determination of the Commission was affirmed and judgment was rendered.

The defendant now claims that the plaintiff is barred from making any recovery in this action on account of the rendition of this judgment; that the Iowa tribunal's determination that plaintiff was engaged in interstate commerce is binding upon this court and that the order of the Industrial Commission is res adjudicata.

This contention of the defendant cannot be sustained. The Court takes the view that the Federal law supersedes all state laws, rules or regulations governing the same subject.

Cases cited by counsel for plaintiff are in point.

Seaboard Air Line Co. vs. Horton, 233 U. S., 492.
Employers' Liability Cases, 223 U. S. 1.
Erie Ry. Co. vs. Winfield, 244 U. S. 170.
New York Ry. Co. vs. Winfield, 244 U. S. 147.

I think the claims of estoppel and res adjudicata as made by the defendant are disposed of by the cases of,—

[fol. 196] Troxell vs. D. L. & W. R. Co., 227 U. S., 434.
St. L. I. M. & S. R. Co. vs. Hesterly, 228 U. S., 700.
Philadelphia & R. R. Co. vs. Hancock, 253 U. S., 284.

The proceedings before the Industrial Commission in Iowa were instituted by the defendant. The widow of decedent objected to those proceedings. At the instance of the railroad company an administrator was appointed and the defendant's liability was determined before the commission and on appeal in the District Court of Iowa. The plaintiff and not the defendant had the election as to how the suit should be brought. To permit the defendant to institute proceedings in its own way in a state tribunal under a state law and to do so even after plaintiff has instituted this cation would defeat the object and the purpose of the Federal Act. Undoubtedly it was the defendant's purpose to accomplish that result. The defendant further sought to interfere with plaintiff's action by enjoining plaintiff's witnesses, through an injunctional order of the Iowa courts from appearing and testifying in this court.

In Chicago, M. St. P. Ry. Co. vs. Schendel, 292 Fed., Rep. 326, the rule was enunciated that a court of equity may not enjoin the bringing of an action in another jurisdiction on the ground of hardships or inconvenience to defendant and witnesses when the right to sue in such other jurisdiction is given by law. Under the Employers' Liability Act providing that actions thereunder for injury or death of employes may be brought in the Federal court in the district of the residence of the defendant, or in which the cause of [fol. 197] action arose, or in which the defendant shall be doing business at the time of commencing such action, and giving to the State Courts concurrent jurisdiction, such jurisdiction cannot be interfered with by a state thru its legislature or courts. It was the duty of this court to try the instant case under the existing law. If practice and policy require that a change be made in the mode of bringing suits under this act such change must undoubtedly come thru federal legislation and not thru the interference of state courts thru the entry of judgments or the issuance of injunctional orders.

Further, I am of the opinion that there is no identity of parties in the proceedings before the Iowa Industrial Commission and the parties to this action.

It was necessary for the representative of the decedent to bring the action, and it could not have been maintained by the widow in whose favor the Industrial Commission made its award.

The plaintiff' interstate and the defendant were engaged in in-

terstate commerce under the verdict of the jury and I think the question was properly submitted.

The Iowa tribunal was without authority to render an order and judgment which is conclusive upon this court and which will defeat a right given to the plaintiff by Congress.

The defendant admits negligence. The questions of contributory negligence and assumption of risk are not in the case. The record sustains the amount of the verdict returned by the jury.

Senn.

[fol. 198] IN DISTRICT COURT OF STEELE COUNTY

[Title omitted]

JUDGMENT—September 18, 1924

This cause having been regularly placed upon the Calendar of the above named Court for the December A. D. 1923, Regular Term thereof, came on for trial before the Court and a Jury duly empanelled and sworn to try the same on the Fourth day of March A. D. 1924, which said Jury did on the Fourth day of March A. D. 1924, duly render a verdict herein which, in substance, is as follows:

"We, the jury empanelled and sworn in the above entitled action, find for the plaintiff and assess his damages in the sum of $26,047.50—Twenty-six Thousand Forty-seven Dollars and 50-100 Dollars.

Dated at Owatonna, Minn., this 4th day of March A. D. 1924.

John Burrock, Foreman.

Now, pursuant to said verdict and on motion of Ernest A. Michell, [fol. 199] one of the attorneys for plaintiff it is hereby adjudged that the Plaintiff recover of the Defendant and each of them the sum of ($26,894.04) Twenty-six Thousand Eight Hundred Ninety-four and 04-100 Dollars, the amount of said Verdict and interest to date hereof, together with ($37.68) Thirty-seven and 68-100 Dollars cost and disbursements, as taxed and allowed, amounting in all to the sum of ($26,931.72) Twenty-six Thousand Nine Hundred Thirty-one and 72-100 Dollars.

By the Court:

Bernard McGovern, Clerk District Court. (Court Seal.)

In District Court of Steele County

[Title omitted]

Notice of Appeal

To Messrs. Davis & Michel, attorneys for plaintiff, and to Bernard McGovern, Esq., clerk of the District Court of Steele County, Minnesota:

[fol. 200] Sirs: Please Take Notice, That the above named defendant appeals to the Supreme Court of the State of Minnesota, from the judgment in the above entitled action, entered and docketed on September 18, 1924, by which it was adjusted and decreed that plaintiff recover of the defendant the sum of Twenty-six Thousand Nine Hundred Thirty-one and 72-100ths ($26,931.72) Dollars. Said appeal is from the whole of said judgment, and from each and every part thereof.

Respectfully, O'Brien, Horn & Stringer, Attorneys for Defendant, 1116 Pioneer Building, St. Paul, Minnesota.

Due and personal service of the above notice of appeal is hereby admitted, this 22nd day of September, 1924.

Davis & Michel, Attorneys for Plaintiff.

Due and personal service of the above notice of Appeal is hereby admitted, this 26th day of September, 1924.

Bernard & McGovern, Clerk District Court, Steele County, Minnesota.

[fols. 201-204] Bond on Appeal for $30,000—Approved; omitted in printing

---

[fol. 205] In Supreme Court of Minnesota

A. D. Schendel, as Special Administrator of the Estate of Clarence Y. Hope, Deceased, Respondent,

vs.

Chicago, Rock Island & Pacific Railway Company, Appellant

Assignments of Error

The court erred:

1. In refusing to direct a verdict in favor of defendant and against plaintiff.

2. In refusing to hold, as a matter of law, that plaintiff's decedent was not at the time of his injury engaged in interstate commerce

and in refusing to hold that he was on the contrary engaged in commerce wholly within the state of Iowa, and in holding this to be a question of fact for the jury.

3. In refusing to hold that the judgment of the District Court of Lucas county, Iowa, by which it was adjudged that plaintiff's [fol. 206] decedent was not engaged in interstate commerce was res judicata and binding and conclusive upon the court and the plaintiff herein, thereby refusing to give full faith and credit to the judgment of the court of Iowa contrary to Section 1 of Article 4 of the Constitution of the United States, and denying to the defendant-appellant its constitutional rights thereunder.

4. In holding that plaintiff was the personal representative of the estate of said decedent within the meaning of the Federal Employers' Liability Act of April 22, 1908, as amended and in so construing said Federal Employers' Liability Act.

5. In holding that plaintiff had title to the cause of action alleged in the complaint and had a right to prosecute this action and in so construing the Federal Employers' Act as amended.

6. In denying the defendant's motion for judgment in its favor notwithstanding the verdict of the jury against it.

7. In denying defendant's motion to set aside the verdict and for a new trial of this action:

A. Because said verdict was not justified by the evidence.

B. Because said verdict was contrary to law.

C. Because of errors of law occurring at the trial and duly excepted to by the defendant at the time.

[fol. 207] D. Because of excessive damages appearing to have been given by the jury under the influence of passion and prejudice.

E. Because of the following errors of law occurring at the trial and herein specifically assigned, to-wit:

(a) The court erred in refusing to direct a verdict in favor of the defendant and against the plaintiff.

(b) The court erred in refusing to hold as a matter of law, that plaintiff's decedent was not engaged in interstate commerce at the time of his injury, and in refusing to hold that plaintiff's decedent was, at the time of his injury, engaged wholly in commerce within the state of Iowa.

(c) The court erred in submitting to the jury the question of whether plaintiff's decedent was engaged in interstate commerce at the time of his injuries.

(d) The court erred in sustaining plaintiff's objection to the introduction of defendant's Exhibit "C," and in excluding said exhi-

bit from the evidence, said exhibit being an exemplified copy of the Workmen's Compensation Act of the State of Iowa; for the reason that it conclusively appeared that said Workmen's Compensation Act of the State of Iowa governed exclusively the rights of the parties to this action.

(e) The court erred in sustaining plaintiff's objection to the introduction of defendant's Exhibit "D," and in excluding said exhibit from the evidence, said Exhibit "D" being an exemplified copy of the judgment of the District Court of the County of Lucas, [fol. 208] Iowa, whereby it was adjudged and decreed that plaintiff's decedent was not at the time of his injury, engaged in interstate commerce, but was on the contrary engaged wholly in commerce within the state of Iowa only, for the reason that said judgment was and is res -judicata and binding upon this court under Section 1, of Article IV, of the Constitution of the United States, and its exclusion from the evidence deprived this defendant of its rights under said United States Constitution.

(f) The court erred in sustaining plaintiff's objection to the introduction of defendant's Exhibit "E," and in excluding said exhibit from the evidence, said exhibit being an exemplified copy of letters of administration of the estate of Clarence Y. Hope, deceased, duly issued by the District Court of Lucas county, Iowa, to E. R. Byers, for the reason that said exhibit conclusively showed that plaintiff was not the "personal representative" of said deceased, within the meaning of the Federal Employers' Liability Act of the United States of April 22nd, 1908, as amended.

(g) The court erred in sustaining plaintiff's objection to the introduction of defendant's Exhibit "F," and in excluding said exhibit from the evidence, said exhibit being an exemplified copy of the proceedings in a certain action pending in the District Court of Hold County, Iowa, brought by E. R. Byers, the domiciliary administrator of the estate of Clarence Y. Hope, deceased, duly appointed by the District Court of Lucas county, Iowa, for the reason that such exhibit conclusively shows th[illegible]he plaintiff had no title to the cause of action set forth in the c[illegible]mplaint herein, and had [fol. 209] no right to bring action therefor.

8. In entering judgment in favor of plaintiff and against defendant, thereby violating Section 1, of Article IV, of the Constitution of the United States, and depriving this defendant of its constitutional rights under said section and article of the constitution.

[fol. 210] [File endorsement omitted]

IN SUPREME COURT OF MINNESOTA

[Title omitted]

OPINION—Filed June 19, 1925

Syllabus

1. The plaintiff's intestate was a conductor on a train hauling coal cars from the mines to a station on the defendant's main line. On the day of his death his crew hauled a drag containing two interstate cars, and a second drag of all intrastate cars. At the station, under his direction, the second drag was pushed against the first and the brakes on the two interstate cars and one intrastate were set by the brakeman at a desired point on the sidetrack. At the mines the conductor received manifests showing the destination of the cars. This information he [fol. 211] telephoned to the operator at a nearby station, and from such information the operator made the shipping bills. The decedent either gave the manifests to the operator or mailed them from the station where he lived. As soon as the brakes were set, which was the last movement in the transportation of the cars, the crew started with the engine and caboose to the station where its members lived for dinner and for water for the engine, intending to return in the afternoon. A rear end collision occurred through the fault of the train dispatcher. The manifests were in the caboose and were burned. If the deceased had reached the station he would have mailed them to the operator. Whether the deceased was employed in interstate commerce was for the jury.

2. After the plaintiff's action under the Federal liability act was commenced, the defendant, as permitted by the compensation act of the state where the accident occurred, instituted a proceeding, making the widow of the deceased a party, for the fixing of compensation. The widow answered, objecting that her rights were not controlled by the compensation act, but by the Federal liability act. She took no part in the proceeding except to answer and appeal. An award was made, and it was pleaded by supplemental complaint as a bar upon the question whether the decedent was employed in interstate commerce. It is held that under the Federal act the plaintiff had a right to have his right determined in the [fol. 212] courts designated by the act, such courts being courts proceeding according to the general course of the common law, and that an award in a later summary compensation proceeding was not a bar.

3. An action under the Federal act can be maintained only by the personal representative, not by the beneficiary. The bene-

ficiary, not the personal representative, is a party in the compensation proceeding. It is held, following Dennison v. Payne, 293 F. 333, 342, that there was not an identity of parties so that an estoppel by the award could be invoked.

4. An action under the Federal liability act may be maintained by a special administrator.

5. The verdict is not excessive.

Judgment Affirmed.

Opinion

Action under the Federal Employers' Liability act to recover for the death of Clarence Y. Hope, plaintiff's intestate, an employe of the defendant. There was a verdict for the plaintiff. The defendant's motion for judgment notwithstanding the verdict or a new trial was denied. The defendant appeals from the judgment entered upon the verdict.

The decedent's death occurred in Iowa in a rear-end collision between a through passenger train and an engine and caboose upon which the deceased and other members of the crew were going home [fol. 213] to dinner after hauling state and interstate cars from the coal mines to the defendant's main line. The accident was caused by the fault of the train dispatcher in letting the engine and caboose onto the main line in front of the coming passenger train. The defendant concedes negligence.

The questions are:

(1) Whether the evidence sustains the finding of the jury that the deceased was employed in interstate commerce.

(2) Whether the proceedings taken in Iowa under its compensation act, upon the initiative of the defendant, after the commencement of this action, resulting in an award to the widow of the decedent, bars a recovery upon the ground that it was there determined that the deceased was engaged in intrastate commerce.

(3) Whether there is such identity of parties as to make the finding that the decedent was employed in intrastate commerce available as an estoppel.

(4) Whether the action may be maintained by a special administrator.

(5) Whether the verdict is excessive.

1. The decedent Clarence Y. Hope, was the conductor of a train engaged in hauling cars from coal mines in Iowa to Pershing on the defendant's main line ten miles away. He and the rest of the crew lived at Chariton on the main line southerly of Pershing. On the morning of February 4, 1923, the plaintiff and his crew left Chariton, went to Pershing, and commenced the work of hauling the [fol. 214] loaded cars of coal from the mines to the Pershing yards.

The first drag was of eleven cars, of which two were interstate. The second drag was of ten cars, all intrastate. Under the directions of Hope the second drag was shoved against the first on a sidetrack and the brakes set on the two interstate cars and one other. Apparently this was done to convenience the work yet remaining. This work was the last which the crew did in the physical movement of the two interstate cars, or in the transportation of any coal cars. The hauling of interstate cars from the mines to the Pershing yards was a movement in interstate commerce. Philadelphia &c. R. Co. v. Hancock, 253 U. S. 284, and cases cited.

Immediately after setting the brakes the engine was coupled to the caboose and the crew started to Chariton for dinner. The collision occurred within the Pershing yard limits. The facts bring the case fairly within those holding the employee within the provision of the act when going to or returning from his place of work. Erie R. Co. v. Winfield, 244 U. S. 170; North Carolina R. Co. v. Zachary, 232 U. S. 248, 260; Director General v. Bennett, 268 F. 767; Erie R. Co. v. Down, 250 F. 415; Dennison v. Payne, 293 F. 333, where the facts are similar to those in the case at bar. The case of Erie R. Co. v. Welsh, 242 U. S. 303, where the work of the employe was finished and he was reporting for orders, is distinguishable. In the Winfield case the court said:

"In leaving the carrier's yard at the close of his day's work the [fol. 215] deceased was but discharging a duty of employment. * * * Like his trip through the yard to his engine in the morning, it was a necessary incident of his day's work and partook of the character of that work as a whole, for it was no more an incident of one part than of another. His day's work was in both interstate and intrastate commerce, and so when he was leaving the yard at the time of the injury his employment was in both. That he was employed in interstate commerce is therefore plain, and that his employment also extended to intrastate commerce is for present purpose of no importance."

When the crew left Pershing for Chariton it intended returning in the afternoon to complete the unfinished work of hauling the coal cars from the mines to the Pershing yards; and if it had done so it would have moved interstate and intrastate cars as occasion required. No further orders to do the work were necessary; though to use the main line in returning to Pershing running orders from the train dispatcher would have been necessary. The crew intended taking water for the engine at Chariton. It could not be had at the mines or at Pershing. The intended return in the afternoon and the necessity of getting water at Chariton are urged by the plaintiff as facts of consequence. Facts somewhat like these were held not important in Dennison v. Payne, 293 F. 333, and cases are cited there in support of that view. There may be distinguishing facts in the cases cited. We do not stop to analyze or consider [fol. 216] them; but it is proper to note that the crew were intending to return and to some extent this may characterize their work at the time. Baltimore &c. Co. v. Kast, 299 F. 419. It was not

reporting to Chariton for orders. There was unfinished work at the mines which would have been done without further direction except for the collision.

There is another feature to which the plaintiff attaches importance. At the mines the conductor received manifests showing the destination of the cars. From Pershing he telephoned to the operator at Williamson, a few miles northerly of Pershing, the information which they contained, and the operator made bills of lading for the conductors who later picked up the cars at Pershing and continued them on their interstate or intrastate journey. It was the duty of the decedent afterward to give the manifests to the operator at Williamson or mail them to him from Chariton. Mailing seems to have been the usual way of doing. The operator checked his shipping bills with the manifests; and the manifests were then filed as a part of the company's records. Hope, on the day of the accident, telephoned as usual the information from Pershing to the operator at Williamson. The manifests were in his custody in the train-book in the caboose at the time of the collision. The fair inference is that they were burned in the fire which followed. If he had reached Chariton, the decedent, in the usual course, would have mailed them to Williamson on the evening train; and to this extent his duties as to the interstate and intrastate [fol. 217] cars hauled from the mines to the Pershing yards were unfinished at the time of his death.

The work which the deceased was doing was so much connected with interstate commerce, so much a part of it, that the question whether he was employed in interstate commerce was at the least one for the jury.

2. The question next for consideration is whether the award in the compensation proceeding is a bar. The deceased died on February 13, 1923, nine days after the collision, leaving his wife, to whom he had been married eleven weeks, and children by a former marriage. The plaintiff was appointed special administrator on February 20, 1923. Both the plaintiff and the defendant were prompt. Suit was brought on February 21, 1923. On March 2, 1923, a proceeding was instituted by the defendant before the industrial commissioner of Iowa under the compensation act against the widow. The compensation act provides that the employer, if an agreement is not reached, may apply for an arbitration. Mrs. Hope answered the defendant's petition for an arbitration alleging that the decedent was employed in interstate commerce, that the compensation act was without application and did not govern her rights, and asked that no relief be granted. She did not refer to the pending action in Minnesota, but in effect alleged that the compensation proceeding was without jurisdiction. She did not join in the appointment of arbitrators. On March 20, 1923, the arbitration com- [fol. 218] mittee awarded her $15 per week for 300 weeks. The widow did not appear but appealed to the Industrial Commissioner. The commissioner, she not appearing, affirmed the arbitration committee. The widow appealed to the district court, but she did not

appear. The district court affirmed the commissioner. The answer of the defendant first interposed alleged the compensation act of Iowa and that the decedent was engaged in intrastate commerce. A supplemental answer alleged the determination by the arbitration committee and commissioner. A second supplemental answer alleged an affirmance by the district court. If the determination in the compensation proceeding is a bar to the prior action under the Employers' Liability Act the plaintiff cannot recover regardless of what his proofs show or the fact is as to the character of the decedent's employment.

The liability of the carrier for the death of an employe is "to his or her personal representative, for the benefit of the surviving widow or husband and children of such employe; and, if none, then of such employe's parents; and, if none, then of the next of kin dependent upon such employe * * *." 35 St. 65; U. S. Comp. St. 1916, § 8657. The provision as to jurisdiction is as follows:

"Under this act an action may be brought in circuit [now district] court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States [fol. 219] under this act shall be concurrent with that of the courts of the several states, and no case arising under this act and brought in any state court of competent jurisdiction shall be removed to any court of the United States." 36 St. 291; U. S. Comp. St. 1916, § 8662.

It was the duty of the Minnesota court to proceed with the action brought by the plaintiff when its jurisdiction was invoked. It was an action which the Minnesota court had competent jurisdiction to try. In Second Employers' Liability Cases, 223 U. S. 1, 55, the court with emphasis stated it to be the duty of a state court, when its jurisdiction as prescribed by local law was adequate to the occasion, to proceed with the enforcement of rights accruing under the act. It has not been doubted since. See Schendel v. McGee, 300 F. 273, 278.

The Federal act, within the field which it covers, supersedes the common law liability, and the liability created by death by wrongful act statutes, or employers' liability acts, or compensation acts. Seaboard Air Line Co. v. Horton, 233 U. S. 492; Erie R. Co. v. Winfield, 244 U. S. 170; N. Y. Cent. R. Co. v. Winfield, 244 U. S. 147; New York &c. Co. v. Tonsellito, 244 U. S. 360; Southern Pac. Ry. Co. v. Ind. Acc. Com., 251 U. S. 259; Philadelphia &c. R. Co. v. Hancock, 253 U. S. 284. The defendant does not claim otherwise. The right of action which the Federal Employers' Liability Act gives is to be enforced in a court proceeding according to the course of the common law in the orderly investigation of facts and [fol. 220] the application of the law. That is the clear purpose of the act. Congress so intended for it designated courts of that character to administer it.

The proceeding before the industrial commissioner is not accord-

ing to the course of the common law. It is a special statutory proceeding, summary in character, and largely administrative, though involving judicial discretion and providing for a judicial review. The statute provides:

"Process and procedure under this act shall be as summary as reasonably may be. While sitting as an arbitration committee, or when conducting a hearing upon review, or in the making of any investigation or inquiry, neither the commissioner nor the arbitration committee shall be bound by common law or statutory rules of evidence, or by technical or formal rules of procedure, but may hold such arbitrations or conduct such hearings and make such investigation and inquiries in the manner best suited to ascertain the substantial rights of the parties." Supp. Code Iowa, 1923, § 2477-m21, as amended; Code Iowa, 1924, § 1441.

The industrial commissioner may review the findings of the arbitration committee. There may be an appeal from the commissioner to the district court. Upon such appeal the findings of the industrial commissioner in the absence of fraud are conclusive; but the court may set aside his order or decree if it finds that he acted in excess of his powers; or that the decree was procured by fraud; or that the facts found do not support the decree; or if there is not [fol. 221] sufficient competent evidence to warrant the decree; but upon no other ground. Id. 2477-m33; Code Iowa, 1924, § 1453. Reference may be had to Hunter v. Colfax Consol. Coal Co., 175 Iowa, 245, where the act is considered at length, and to Hawkins v. Bleakly, 243 U. S. 210, where the court said that "the act prescribes the measure of compensation and the circumstances under which it is to be made, and establishes administrative machinery for applying the statutory measure to the facts of each particular case; provides a hearing before an administrative tribunal and for judicial review upon all fundamental and jurisdictional questions."

The claim of the defendant is that the finding that the decedent was engaged in intrastate commerce, necessary to an award in the compensation proceeding, and expressly made, binds the personal representative of the deceased, proceeding under the Federal act in an earlier commenced action. It does not claim that the award is res adjudicata in the broad sense, but that it is an estoppel upon the question of the character of the deceased's employment. If this view be the correct one the question whether courts of common law jurisdiction, designated by Congress, shall determine the employe's rights in a common law proceeding, or whether they shall be determined by compensation boards proceeding summarily, may depend upon which moves with the greater celerity; and in the ordinary case it is the compensation board. It is illustrated here. The award was made within 18 days after the commencement of the proceeding, [fol. 222] and in 90 days after the commencement of the proceeding the award was affirmed by the court. It was a year after its commencement before the action based on the Federal right was called for trial.

The defendant relies and rightly enough upon Williams v. South-

ern Pac. Ry. Co., 54 Cal. App. 571, a carefully considered case. There the plaintiff, who was the beneficiary, brought an action as administratrix of her husband to recover under the federal act. Later, just prior to the expiration of the statutory limitation fixed by the compensation act, and to save her right if she failed in her action under the Federal act, she applied in her individual capacity for an adjustment under the compensation act. She asked that the proceeding be held in abeyance, but the commission proceeded with it, made her an award, the award was pleaded as res adjudicata, and was held to be so. The result was harsh. It seems that something is wrong in the law or its administration, if one claiming and enforcing a cause of action under the Federal act, the character of the employment as interstate determining his right, and the character of his employment being uncertain as a question of law, or for the jury as a question of fact, must lose it if he seeks to protect himself in a less valuable right under the compensation act. See Corbett v. Boston & Maine R. Co., 219 Mass. 351. This is not quite the case here, for the beneficiary fought against instead of for the application of the compensation act. It is harder here than in the California [fol. 223] case, assuming that the beneficiary had a right under the Federal act, as found by a tribunal designated by Congress to try the question, if she must take against her will a per week award for 300 weeks, the aggregate of which is but a fraction of what she would have under the verdict of the jury, and the yearly amount of which is less than a low rate of annual interest upon her actual damage. Such a result does not change the law, but it prompts the inquiry whether it is the necessary or intended result. From the facts surrounding the accident, and with causal negligence admitted as here, there arose one cause of action. It was under the Federal act or the Iowa compensation act. Of course the facts making it the one or the other are different; but the determining single question was whether the decedent was employed in interstate commerce.

The question presents some difficulty. The defendant forcefully argues that the beneficiary had her remedy as defendant in the compensation proceeding; that if it was there found that the deceased was engaged in intrastate commerce, as it was found, the award and nothing else was her right; that if it had been found that he was not engaged in intrastate commerce she was left to the result of the action brought by the administrator; and that the finding in the compensation proceeding is rightly a bar. The argument is plausible. It may be sound. No case precisely in point is found, for in the California case the beneficiary took her case to the industrial board, [fol. 224] as did the beneficiary in Dennison v. Payne, 293 F. 333, 342, where it was assumed that the finding in the compensation proceeding might be a bar, but not directly so held, for the decision was placed upon another ground. Here the beneficiary did not invoke the aid of the compensation board, protested that her husband met his death while employed in interstate commerce, that her rights were not controlled by the compensation law, and participated in the proceeding only formally.

Without authority controlling or certainly guiding us, we are con-

tent to hold that the substantive right given the employe or his representative by Congress under express constitutional grant, with the courts to which he may go for its enforcement pointed out to him, is a superior substantive right; and that when he or his representative has chosen the forum to which to submit his cause, he cannot, against his objection and upon the initiative of his employer, be required to submit it in a summary proceeding commenced later under a compensation act.

If the action had been brought in a Federal district court in Iowa, as with great propriety it might have been, we cannot think that the Federal court would have permitted the defendant to assert as a bar against the plaintiff an award to the beneficiary in the later compensation proceeding, made against the protest of the beneficiary that her rights were determinable in the pending action. The result should be the same if the action were brought in a Federal court [fol. 225] in Minnesota as it might have been or in a state district court of Iowa, where it might have been brought with greater convenience than in Minnesota. And it should be the same when brought in a state court of Minnesota designated by Congress as a proper court. It may be that the widow did not in her private capacity do what she could have done to protect herself. It may be that the plaintiff, anticipating the plea of a bar, might have done something more than he did. It may be that the well understood rule, recently discussed in Kline v. Burke Cons. Co., 260 U. S. 226, that when two actions, both in personam, are pending, jurisdiction in one is not affected by the other, does not apply in full where there is one action proceeding according to the course of the common law to enforce a right given by Congress and another, proceeding summarily, under a statute to enforce a right given by a state compensation act. The widow was the only party in the compensation proceeding. The other beneficiaries are foregotten in that proceeding and in the action under the Federal act. The plaintiff was not a party to the compensation proceeding. And this brings us to the question whether there is such identity of parties as to enable the defendant to invoke an estoppel.

3. It is the contention of the plaintiff that though the fact of the character of employment found in the compensation proceeding might in a particular case be an estoppel in a subsequent action, there can be no estopped here because of lack of identity of the parties.

[fol. 226] The right of recovery under the employers' liability act is in the personal representative, not in the beneficiaries. The award under the compensation act is to the beneficiaries. The personal representative of the decedent does not participate. The beneficiaries cannot sue under the federal act. American Railroad Co. v. Birch, 224 U. S. 547; Missouri &c. Co. v. Wulf, 226 U. S. 570; St. Louis &c. Co. v. Seale, 229 U. S. 156. If the holding by the circuit court of appeals in Dennison v. Payne, 293 F. 333, 342, is correct, and it is the only federal authority directly in point, it should be held that there was a lack of identity of parties and therefore no estoppel. There the beneficiary, who as administratrix was plaintiff in an ac-

tion under the Federal act to recover for the decedent's death, petitioned for an award under the compensation act, but stated that it was done to avoid the possible bar of the statute of limitations. Nevertheless the proceeding continued and an award was made to the beneficiary. The court relied upon the principle of Troxell v. Delaware &c. Co., 227 U. S. 434, where the circumstances were different; but the rule as to the necessity of identity of parties was stated there. In reaching its conclusion the court of appeals said:

"In the present suit there was not identity of parties, and that is sufficient to make the doctrine of res judicata inapplicable. As in our opinion the plaintiff's intestate was engaged in interstate commerce at the time of his death, and as the proceedings before the Pennsylvania state board were not between the same parties, they [fol. 227] therefore cannot estop the plaintiff from maintaining the present suit."

We follow the federal authority and hold that there was not the requisite identity of parties.

4. The plaintiff is special administrator. The federal statute puts the cause of action in the personal representative. Our holdings are that a like action under our death by wrongful act statute, or under statutes of other states, may be maintained by a special administrator. Jones v. Minn. T. Co., 108 Minn. 129; Castigliano v. Great N. Ry. Co., 129 Minn. 279; State v. Probate Court, 149 Minn. 466. The personal representative is but a trustee for the purpose of recovering for designated beneficiaries. The practice has been frequent both in the state and federal courts to bring the action in the name of a special administrator and we abide by our former holdings.

5. The verdict was for $26,047.50. The defendant urges that it is excessive. The deceased was 49 years old. His life expectancy was between 21 and 22 years. He had been married to his present wife eleven weeks. He contributed from $135 to $150 a month to her. His earnings were considerably greater. He had children by a former wife, but as to them the record gives us no information. He was badly burned. The testimony of his nurse is that he was unconscious all of the 9 days that he lived. The testimony of the widow is that he was at times conscious, spoke rationally, and suffered [fol. 228] greatly. With the evidence so it was proper to award damages for conscious pain and suffering. We do not allow a substantial award for pain and suffering unless there is substantial evidence of it, nor is a jury permitted to make an emotional award through sympathy for suffering. Fries v. Chicago, R. I. & P. Ry. Co., 198 N. W. 998. How much of the verdict was for pain and suffering the record does not show. The amount of it is fairly sustained. Clark v. Davis, 153 Minn. 143; Schendel v. Chicago &c. Co., 198 N. W. 450.

It may be noted that if subsequent events make it desirable the trial court, having charge of the distribution of the fund, can re-

quire the discharge of liability upon the compensation award so that the defendant will not be inconvenienced thereby.

Judgment affirmed.
Mr. Justice Stone took no part.

[fol. 229] IN SUPREME COURT OF MINNESOTA

[Title omitted]

PETITION FOR STAY

The above named appellant, feeling itself aggrieved by the order for judgment of this Court herein, by which this Court did order judgment affirming in all things the judgment of the Court below, and desiring to petition the Supreme Court of the United States for a writ of certiorari to review the final judgment of this Court, when entered, does hereby pray that the Court do enter its order staying all proceedings herein and during the pendency of such petition for a writ of certiorari to said United States Supreme Court.

The Chicago, Rock Island & Pacific Railway Company, by O'Brien, Horn & Stringer, Its Attorneys.

[fol. 230] IN SUPREME COURT OF MINNESOTA

ORDER OF STAY—June 22, 1925

Upon application of the above named appellant:

It Is Ordered, that upon and after the entry of final judgment herein affirming the judgment of the Court below, all proceedings herein in this court and in the District Court of Steele county, Minnesota, including the issuance of any writ of execution out of either court and the issuance of any remittitur from this court to the court below, be and hereby are in all things stayed pending the petition of the appellant for a writ of certiorari to the United States Supreme Court.

Homer B. Dibell, Justice.

[fol. 231] IN SUPREME COURT OF MINNESOTA

[Title omitted]

JUDGMENT—June 30, 1925

Pursuant to an order of Court heretofore duly made and entered in this cause it is determined and adjudged that the judgment of

the Court below, herein appealed from, to-wit: of the District Court within and for the County of Steele, be and the same hereby is in all things affirmed.

And it is further determined and adjudged that respondent herein, do have and recover of appellant herein the sum and amount of eighty-two and 50/00 dollars ($82.50) costs and disbursements in this cause in this court, and that execution may be issued for the enforcement thereof.

Dated and signed June 30th, A. D. 1925.

By the Court:
Attest: Grace F. Kaercher, Clerk.

Statement for Judgment

Statutory costs, $25.00; printer, $57.50; total, $82.50.

[fol. 232] In Supreme Court of Minnesota

[Title omitted]

Clerk's Certificate

I, Grace F. Kaercher, Clerk of the Supreme Court of the State of Minnesota, do hereby certify that the foregoing, consisting of 231 numbered pages, is a true and complete transcript of the record in the above cause on appeal to this court, comprising the record on appeal from the District Court of the Fifth Judicial District in and for the Steele county, Minnesota, to this court, together with all proceedings in said cause in this court, including the opinion of the court thereon and the final judgment of this court on said appeal.

In Witness Whereof I have hereunto set my hand and affixed the seal of this court, this 27 day of July, 1925.

Grace F. Kaercher, Clerk of the Supreme Court of the State of Minnesota. (Seal of the Supreme Court, State of Minnesota.)

[fol. 233] In Supreme Court of the United States

Order Allowing Certiorari—Filed October 19, 1925

The petition herein for a writ of certiorari to the Supreme Court of the State of Minnesota is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

No. 684

IN THE

UNITED STATES SUPREME COURT

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY,

Petitioner,

vs.

FRED A. ELDER,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

M. L. BELL,
New York, New York,
W. F. DICKINSON,
DANIEL TAYLOR,
Chicago, Illinois,
THOMAS D. O'BRIEN,
EDWARD S. STRINGER,
St. Paul, Minnesota,
Counsel for Petitioner.

A.

SUBJECT INDEX.

		Page.
B.	Reference to Opinion Below	1
C.	Grounds of Jurisdiction	1
	1. Date of Judgment Below	1
	2. Specific Claims and Rulings	1
	3. Statutory Reference Giving Jurisdiction	2
	4. Authorities Sustaining Jurisdiction	2
D.	Statement of Case	3
E.	Assignments of Error	7
F.	Argument	8
	1. Binding Effect of Iowa Judgment.	9
	a. Iowa Court had Right to Determine Character of Commerce	9
	b. In any Event Only Error not Question of Jurisdiction	13
	2. Decision of Industrial Commissioner is a Judgment	15

TABLE OF CASES.

	Page.
Allis v. Davidson, 23 Minn. 442	12
Boatmans Bank v. Fritzlen, 135 Fed. 650	12
Cromwell v. Sac County, 94 U. S. 351	9

1480

Centralia Coal Co. v. Industrial Commission, 297 Ill. 451, 130 N. E. 727 16
Coen v. James, 150 N. Y. Sup. 202 17
Dennison v. Payne, 293 Fed. 333 .....10, 16
Dowell v. Applegate, 152 U. S. 327 15
Erie Ry. v. Winfield, 244 U. S. 170 10
Elder v. C. R. I. & P. Ry. Co., 204 N. W. 557. 1
First Employers' Liability Cases, 207 U. S. 463 10
Forsyth v. Hammond, 166 U. S. 506 2
Hawkins v. Bleakly, 243 U. S. 210 3
Hunter v. Colfax Cons. Coal Co., 175 Ia. 245, 154 N. W. 1037 .....3, 16
Hibben v. Smith, 62 N. E. 447 16
Insurance Co. v. Harris, 97 U. S. 331 12
In re Hunnewell, 107 N. E. 934 16
Jackson v. Industrial Board, 280 Ill. 526, 117 N. E. 705 .....13, 16
Lumberman's, etc., Co. v. Bissell, 190 N. W. 283 16
Myers v. International Co. 263 U. S. 64..... 9
McMahon v. Pithan, 166 Iowa 498, 147 N. W. 920 17
Minn. Sugar v. Iverson, 91 Minn. 30, 97 N. W. 454 17
N. Y. Central Ry. v. Tonsellito, 244 U. S. 360. 11
N. Y. Central v. Winfield, 244 U. S. 147..... 11
N. Y. Central Ry. v. General Electric Co., 146 N. Y. Sup. 322, 153 N. Y. Sup. 478, 114 N. E. 115 17
Schendel v. C. R. I. & P. Ry. Co., 204 N. W. 552 3

Schuler v. Israel, 120 U. S. 506 12
Seaboard Air Line v. Horton, 233 U. S. 492.. 11
Sheets v. Ramer, 125 Minn. 98, 145 N. W. 787 9
Southern Pacific Ry. v. Jensen, 244 U. S. 205. 14
Southern Pacific Ry. v. United States, 168 U. S. 1 9
State v. Houston, 94 Neb. 445, 50 L. R. A. (N. S.) 227 17
State v. Hynes, 82 Minn. 34, 84 N. W. 636... 17
State v. Dunn, 86 Minn. 301, 90 N. W. 772... 17
Taylor v. Robert Ramsey Co., 114 Atl. 830..14, 16
Toy Toy v. Hopkins, 212 U. S. 542 15
Williams v. Southern Pac. Ry., 202 Pac. 356, 54 Cal. App. 571 .....10, 12, 16
Williams v. Southern Pacific, 258 U. S. 622.. 10

IN THE

UNITED STATES SUPREME COURT

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY,

Petitioner,

vs.

FRED A. ELDER,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

B.

The opinion of the court below, the Supreme Court of Minnesota, is reported in Elder v. Chicago, R. I. & P. Ry. Co., 204 N. W. 557. It is not yet reported in the official Minnesota Reports.

C.

1. The date of the judgment sought to be reviewed is June 30, 1925. (Record 254.)

2. The specific claims advanced and rulings made which are relied upon as the basis of this court's jurisdiction are:

Petitioner claimed both in the District Court of Steele County, Minnesota, and in the Supreme Court of Minnesota, that a certain judgment of the Iowa Industrial Commissioner, was res judicata, and a bar to plaintiff's cause of action, under the full faith and credit clause of the Constitution of the United States, Section 1, Article IV. This claim of your petitioner was determined both by the District Court of Steele County, Minnesota, and by the Supreme Court of Minnesota against your petitioner. Petitioner especially set up and claimed a right under the Constitution of the United States, and the right so expressly set up and claimed was denied by the Supreme Court of the State of Minnesota. (R. 12, 126, 127, 128, 129, 231, 233, 234, 236, 237, 246, 247, 250, 251.)

3. The jurisdiction of this court is invoked in this cause, under Section 237 of the Judicial Code, as amended by the Act of February 13, 1925, "An act to amend the Judicial Code, and to further define jurisdiction of the Circuit Courts of Appeal, and of the Supreme Court, and for other purposes."

4. The jurisdiction of this court is sustained by the following:

Forsyth v. Hammond, 166 U. S. 506, Subsection (a), Section 5, Rule 35, of Revised Rules, effective July 1, 1925.

D.

STATEMENT OF THE CASE.

This case, and its companion case, *Chicago, R. I. & P. Ry. Co.,* Petitioner, v. *A. D. Schendel,* as administrator, Respondent, in which case an application for a writ of certiorari is likewise filed in this court, grew out of the same accident. The two cases, while differing in some respects, have many points in common. The two cases should be considered together.

Plaintiff-respondent was injured in a wreck near Pershing, Iowa, (within the state of Iowa), on February 4, 1923. Negligence is conceded. The question at issue was whether he was engaged in interstate commerce so that the remedy was under the Federal Employers' Liability Act of April 22, 1908, or in intrastate commerce, so that the remedy was under the Workmen's Compensation Act of Iowa. (R. 142-192.) A summary of its provisions is found in *Hunter v. Colfax Consolidated Coal Co.,* 175 Ia. 245, 154 N. W. 1037, and in *Hawkins v. Bleakly,* 243 U. S. 210, and in the opinion of the court below in the companion case of Schendel v. C. R. I. & P. Ry. Co.. Petitioner contends that a certain unreversed judgment of the Iowa Industrial Commissioner, entered on Feb. 13, 1924, conclusively determined the commerce to be intrastate. It reads in part as follows:

> 3. That at the time of the injury in question the said Fred Elder was not engaged in interstate commerce so as to prohibit cover-

age by the Iowa Workmans Compensation Law.

4. That the case is subject to adjustment under the Iowa Workmen's Compensation Law. (R. 220.)

Eliminating entirely for the present this Iowa judgment, and viewing the facts as shown by the record most favorably to plaintiff, at most it made a question of fact as to whether decedent was engaged in interstate commerce. Petitioner contended in the court below, and still contends, that (even without the Iowa judgment) decedent was engaged in intrastate commerce as a matter of law. But for the purpose of argument only, we will concede an issue of fact.

Petitioner contends that under the full faith and credit clause of the Constitution of the United States, this judgment concluded the entire matter, and the denial of petitioner's claim in this respect constitutes the basis of this court's jurisdiction.

Plaintiff (respondent) began an action under the Federal Employers' Liability Act, in the District Court of Steele County, Minnesota, on Oct. 30, 1923 (R. 2). On Jan. 5, 1924, petitioner began a proceeding before the Industrial Commissioner of Iowa, under and pursuant to the Iowa Workmen's Compensation Act (R. 196).

Elder answered asserting that he was engaged in interstate commerce and hence that the Iowa Compensation Act was without application (R. 199-205). The arbitration committee provided for

by the Iowa Compensation Act was waived by the parties and the matter submitted to the Deputy Industrial Commissioner (R. 217) who found that Elder was engaged in intrastate commerce (R. 220). Elder filed an application in review, (R. 222), which was not acted upon at the time of trial although the Industrial Commissioner afterwards affirmed the judgment of the Deputy Industrial Commissioner.

In the action in the Steele County District Court, the judgment of the Industrial Commissioner was pleaded as res adjudicata, and as a bar under the full faith and credit clause of the United States Constitution (R. 10-12-17). The action was tried on March 1 to 3, 1924, resulting in a verdict for the plaintiff, and necessarily a finding by the jury that the plaintiff-respondent was engaged in interstate commerce, which was the only question submitted to it (R. 15, 130-137, 229).

Petitioner offered in evidence a copy of the Iowa judgment, including all proceedings leading up to it, duly exemplified under the Federal Constitution (R. 126, 192-227). Upon objection, ruling was deferred, until a ruling upon petitioner's motion for a directed verdict (R. 127). Such motion by petitioner for a directed verdict was thereafter made upon the strength of the Iowa judgment (R. 127-128), and denied by the court (R. 129), and the Iowa judgment excluded from the evidence (R. 129). After the verdict, the court denied a motion for judgment notwithstanding the verdict,

or for a new trial on the same ground (R. 230-237). From a judgment entered on the verdict (R. 238), petitioner appealed to the Supreme Court of Minnesota (R. 239), urging the same ground of reversal (R. 246-247). The Supreme Court filed its opinion and order for judgment on June 19, 1925, in all things sustaining the lower court (R. 249 to 251), and on June 30, 1925, final judgment of affirmance was entered in the Supreme Court (R. 254).

The Federal question, the denial of petitioner's right under the full faith and credit clause of the Constitution, was squarely raised at the following stages of the proceedings:

1. Supplemental answer (R. 10).

2. Offer of the Iowa judgment in evidence (R. 126).

3. Motion for a directed verdict (R. 127).

4. Motion for judgment notwithstanding the verdict, or a new trial, (R. 230-233, particularly folios 691-692).

5. In the Supreme Court upon appeal from the judgment (R. 246-247).

E.

ASSIGNMENTS OF ERROR.

The Supreme Court of the State of Minnesota erred:

1. In refusing to give full faith and credit to the final judgment of the Iowa Industrial Commissioner, contrary to Section 1, of Article IV, of the Constitution of the United States.

2. In entering final judgment affirming the District Court of Steele County, Minnesota, in refusing to give full faith and credit to the final judgment of the Iowa Industrial Commissioner, contrary to Section 1, of Article IV, of the Constitution of the United States.

3. In entering judgment affirming the District Court of Steele County, Minnesota, in:

a. Refusing to receive in evidence the exemplified copy of the Iowa judgment.

b. Refusing to direct a verdict for the defendant (petitioner) because of said Iowa judgment.

c. Refusing to grant judgment for the defendant (petitioner) notwithstanding the verdict of the jury against it, because of said Iowa judgment.

d. Refusing to grant a new trial because of said Iowa judgment.

e. Entering judgment in favor of plaintiff (respondent) and against defendant (petitioner) contrary to said Iowa judgment.

F.

ARGUMENT.

The Supreme Court of Minnesota in its opinion holds that the judgment of the Iowa Industrial Commissioner was not entitled to full faith and credit under the Federal Constitution, because:

The Iowa judgment was not binding for the reason that:

> "Without authority controlling or certainly guiding us, we are content to hold that the substantive right given the employe or his representative by Congress under express constitutional grant, with the courts to which he may go for its enforcement pointed out to him, is a superior substantive right; and that when he or his representative has chosen the forum to which to submit his cause, he cannot, against his objection and upon the initiative of his employer, be required to submit it in a summary proceeding commenced later under a compensation act."

This quotation is from the Schendel case but the decision in that case was the basis of the decision in this case (R. 250-251).

I.

Binding Effect of the Iowa Judgment.

The court's conclusion is

(a) Manifestly wrong; but

(b) Even if right, as an abstract proposition of law, does not support the conclusion reached because it only goes to the correctness of the Iowa court's decision and not its jurisdiction.

(a)

It should be unnecessary to cite authorities for the familiar rule that where a fact is once established by a judgment of a tribunal of competent jurisdiction, it cannot be litigated in another action.

Southern Pacific Ry. v. United States, 168 U. S. 1.

While possibly the Iowa judgment is not res adjudicata in its broad sense in this action, it is certainly an estoppel by verdict in that it squarely determined the character of the commerce, and that determination is conclusive in this action.

Sheets v. Ramer, 125 Minn. 98, 145 N. W. 787.

Meyers v. International Co., 263 U. S. 64.

Cromwell v. Sac County, 94 U. S. 351.

As we read the opinion of the court below, it recognizes this rule, but holds that since there was an assertion of a cause of action under the Federal Employers' Liability Act, the Iowa tribunal was

immediately divested of its right to determine whether there was a cause of action under its own laws. A moment's reflection will clearly demonstrate the fallacy of the court's reasoning.

Absolutely no authority is cited to support the court's conclusion. THE ONLY TWO AUTHORITIES IN THE COUNTRY SQUARELY IN POINT, HOLD CONTRARY TO THE CONCLUSION REACHED BELOW. *Williams v. Southern Pacific*, 202 Pac. 356, 54 Cal. App. 571, (certiorari denied, 258 U. S. 622) holds squarely that such a judgment in a compensation proceeding is conclusive in an action brought under the Federal Act. It is absolutely impossible to distinguish the Williams case from the case at bar, although the court below attempts a fanciful distinction. Likewise, the case of *Dennison v. Payne*, 293 Fed. 333 (Circuit Court of Appeals, of the Second Circuit), while differing with the California court in the Williams case on another phase, holds squarely that the judgment in the compensation case is binding in the action under the Federal act.

There are involved two sovereign powers, the State of Iowa, and the United States. Each is supreme in its own sphere, the State as to intrastate commerce, the United States as to interstate commerce. The United States cannot by legislation, regulate or interfere with the conduct of intrastate commerce, or add to or subtract from any substantive right given by the state law, except as may be necessary for the protection of interstate commerce.

A state may neither regulate nor interfere with interstate commerce, nor can the state by legislation, add to or subtract from any substantive right given by Congress. In that field, the Federal law is supreme.

Seaboard Air Line v. Horton, 233 U. S. 492.
Erie Ry. v. Winfield, 244 U. S. 170.
N. Y. Central Ry. v. Winfield, 244 U. S. 147.
N. C. Central Ry. v. Tonsellito, 244 U. S. 360.

The state of Iowa has legislated as to the remedy to be given for an injury occurring in intrastate commerce, and has created a tribunal for enforcing such remedy. That tribunal is the Industrial Commissioner, subject to review by the courts. He has, under the specific terms of the act creating his office, jurisdiction only in cases occurring in intrastate commerce.

The United States has, by the Federal Employers' Liability Act, legislated as to the remedy for an injury occurring in interstate commerce, and while not creating a new tribunal for the enforcement of rights under that act, in effect it has done so by utilizing the courts of the state and Federal government already in existence. These tribunals have jurisdiction (as to accidents occurring in Iowa) only of accidents in interstate commerce.

In order that either tribunal may exercise jurisdiction it must find the jurisdictional facts. It necessarily has authority to determine whether it has jurisdiction.

The Iowa tribunal therefore has jurisdiction to determine whether the commerce is interstate or intrastate. A finding of interstate commerce ousts it of jurisdiction.

Conversely (as to Iowa accidents), the tribunals for enforcing the Federal act likewise have authority to determine whether they have jurisdiction, and consequently authority to determine the character of the commerce. A finding of intrastate commerce ousts them of jurisdiction

We have therefore, a situation where both tribunals have authority to determine the facts upon which their respective jurisdictions depend. The first final judgment entered, no matter in which tribunal, determines the matter for all times. It makes no difference which proceeding or action was started first. It is not the final judgment in the first suit that governs, but the first final judgment, although it may be in the second suit.

Boatman's Bank v. Fritzlen, 135 Fed. 650.
Allis v. Davidson, 23 Minn. 442.
Insurance Co. v. Harris, 97 U. S. 331.
Schuler v. Israel, 120 U. S. 506.

See also the authorities cited in:
Williams v. Southern Pacific Ry., 202 Pac. 356, 54 Cal. App. 571.

Had the court below determined that the deceased was engaged in interstate commerce before the Iowa court found to the contrary, that finding, until set aside, would have been binding on the

Iowa tribunal in any proceeding brought under the Iowa Compensation Act.

Jackson v. Industrial Board, 280 Ill. 526, 117 N. E. 705.

Since however the Iowa tribunal determined the character of the commerce to be intrastate before the question came up for determination in Minnesota, the Iowa judgment was conclusive upon the Minnesota courts.

The court below ignored the Iowa judgment because the jury below disagreed with the Iowa tribunal on an issue of fact. The court below takes the position that since interstate commerce was asserted, the court in which it was asserted was the only tribunal that could determine whether it existed. Stating it another way, it held that the Iowa tribunal could not determine its own jurisdiction. Merely to state the proposition is to demonstrate its unsoundness.

(b)

Even if, as an abstract proposition, the conclusion of the court below is sound, it does not involve the jurisdiction of the Iowa tribunal, but only the correctness of its decision.

The court below holds that a party who has commenced an action claiming under the Federal Act, *cannot be required* to litigate the interstate commerce question before the Industrial Commissioner. The barrier which the court below does not attempt to, and of course could not get over,

is that the Iowa tribunal in this particular case determined that he *could be required* to do exactly this.

If the court below is right, it merely means that the Iowa Commissioner was wrong in the conclusion he had reached. If the Iowa Commissioner was wrong, the way to correct the error was to appeal and not by a collateral attack upon his judgment.

Thus in 23 Cyc. 1088, it is stated:

> "Where the court judicially considers and adjudicates the question of its jurisdiction and decides that the facts exist which are necessary to give it jurisdiction of the case, *the finding is conclusive and cannot be controverted in a collateral proceeding.*"

See also

34 Corpus Juris, 552 and cases cited.

In *Taylor v. Robert Ramsey Co.,* 114 Atl. 830, the Supreme Court of Maryland held that the jurisdiction of the State Industrial Commission to make an award under the Compensation Act, was not open to collateral attack. The Industrial Commission had awarded compensation to a man engaged in a maritime occupation. This court thereafter in another case held that a state could not include men employed in maritime occupations within its compensation act.

Southern Pac. Co. v. Jensen, 244 U. S. 205.

Therefore though the Industrial Commission was clearly wrong, nevertheless it was held that the award under the compensation act was valid.

The only way to correct an error in the conclusion of the Iowa Commissioner, is by direct appeal.

Toy Toy v. Hopkins, 212 U. S. 542,

where this court held (syllabus):

> "Even though the Circuit Court erroneously retains jurisdiction of a criminal case against an allottee Indian, *its judgment is not void but should be corrected on appeal or by writ of error and cannot be attacked in habeas corpus* proceedings."

Likewise in the case of *Dowell v. Applegate*, 152 U. S. 327, this court said, on page 340:

> "These authorities above cited, it is said, do not meet the present case, because the ground on which it is claimed the Federal Court assumed jurisdiction was insufficient in law to make this case one arising under the laws of the United States. But that was a question which the Circuit Court of the United States was competent to determine in the first instance. Its determination of it was the exercise of jurisdiction. *Even if that court erred in entertaining jurisdiction, its determination of that matter was conclusive upon the parties before it, and could not be questioned by them or either of them collaterally, or otherwise than on writ of error or appeal to this court.*"

II.

THE DECISION OF THE INDUSTRIAL COMMISSIONER IS A JUDGMENT WITHIN THE MEANING OF THE CONSTITUTION.

While the court below did not consider the proposition, evidently deeming it to be without merit, it was strenuously contended by respondent in the court below that the decision of the Industrial Commissioner was not a judgment within the meaning of the full faith and credit clause of the Constitution.

In *Hunter v. Colfax Consolidated Coal Co.*, 175 Ia. 245, 154 N. W. 1037, the Supreme Court of Iowa construed the Iowa Compensation Act, holding that the Industrial Commissioner was acting judicially in adjudicating cases arising under the Compensation Act.

That the decision of the Industrial Commissioner is res adjudicata, and hence a judgment entitled to full faith and credit, see the following decisions:

Williams v. Southern Pac. Ry. Co., supra.

Dennison v. Payne, supra.

In re Hunnewell (Mass.), 107 N. E. 934.

Centralia Coal Co. v. Industrial Commission, 297 Ill. 451, 130 N. E. 727.

Taylor v. Robert Ramsey Co., supra.

Lumbermans Mut. Casualty Co. v. Bissell (Mich.), 190 N. W. 283.

Jackson v. Industrial Board, supra.

Hibben v. Smith, (Ind.), 62 N. E. 447.

McMahon v. Pithan (Ia.), 147 N. W. 920.
State of Nebraska v. Houston, 94 Neb. 445, 50 L. R. A. (N. S.) 227.
New York Centl. v. General Electric Co., 146 N. Y. Sup. 322, 83 Misc. Rep. 529.

This case was reversed by the Appellate Division of the Supreme Court in 153 N. Y. Sup. 478, but the decision of the Appellate Division was again reversed by the Court of Appeals in 114 N. E. 115.

Coen v. James, 150 N. Y. Sup. 202.
State v. Hynes, 82 Minn. 34, 84 N. W. 636.
State v. Dunn, 86 Minn. 301, 90 N. W. 772.
Minnesota Sugar Co. v. Iverson, 91 Minn. 30, 97 N. W. 454.

The court below was clearly wrong in the determination of a Federal question arising under the Constitution of the United States. A writ of certiorari should be granted to correct its judgment.

Respectfully submitted.

M. L. Bell,
New York, New York,
W. F. Dickinson,
Daniel Taylor,
Chicago, Illinois,
Thomas D. O'Brien,
Edward S. Stringer,
St. Paul, Minnesota,
Counsel for Petitioner.

No. 684

IN THE

Supreme Court of the United States.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, *Petitioner,*

vs.

FRED A. ELDER, *Respondent.*

BRIEF IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI.

TOM DAVIS AND
ERNEST A. MICHEL,
419 Metropolitan Bank Bldg.,
Minneapolis, Minnesota,
LEACH & LEACH,
Owatonna, Minnesota,
Attorneys for Respondent.

Hayward Brief Company, 601-607 Fourth Ave. So., Minneapolis

IN THE

Supreme Court of the United States.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, *Petitioner,*

vs.

FRED A. ELDER, *Respondent.*

BRIEF IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

This action was tried before the court and a jury in the District Court of Steele County, Minnesota. There was a verdict for the plaintiff.

Subsequently judgment was entered on the verdict and defendant, the petitioner here, appealed to the Supreme Court of Minnesota.

The Supreme Court of Minnesota affirmed the judgment of the District Court.

It is to review this judgment that the writ of certiorari herein is sought.

The action is founded on the Federal Employers' Liability Law.

STATEMENT OF FACTS.

Elder, the respondent, while employed as a railway freight brakeman by petitioner, was injured, due to petitioner's negligence.

At the trial, petitioner conceded that it was negligent and that such negligence was the proximate cause of respondent's injuries.

Petitioner's Contention.

Generally stated, the contention of petitioner is that an adjudication by the Deputy Industrial Commissioner of the State of Iowa, which was reached before the verdict in this case, constituted a "judgment," and that this "judgment" constituted a bar to respondent's right to maintain the action under the Federal Law in the State of Minnesota.

It is claimed that the Deputy Industrial Commissioner found as a fact that respondent was engaged in intrastate commerce and that because of this finding, the action under the Federal statute could not be maintained in the District Court of Steele County, Minnesota.

Facts Relative to the Finding (Called a "Judgment" by Petitioner) of the Deputy Industrial Commissioner of Iowa.

Elder was injured in the State of Iowa. After his injury, on *October 30th, 1933*, he commenced an action in the District Court of Steele County, Min-

nesota, to recover damages under the Federal Employers' Liability Law.

Defendant answered on November 19th, and pleaded the defenses of assumption of risk, contributory negligence, and also that the action was governed by the Compensation Law of Iowa.

In the original answer there was no claim of any proceeding before the Industrial Commission of Iowa in an attempt to evade the Federal statute.

The plaintiff interposed a reply on November 19th, 1923.

About three and one-half months later, while the action was pending in the District Court of Steele County, and on *February 19th, 1924,* the defendant filed a supplemental answer, setting forth the claim that Elder had been served with notice to appear before the Compensation Board of Iowa and that an award had been made in his "favor" by the Compensation Board.

Elder did not ask for compensation under the Iowa act. Under that act either party may initiate proceedings. The railway company initiated proceedings before the Iowa Industrial Commission.

On the 13th day of February, 1924, the Deputy Industrial Commisioner of Iowa made an order awarding compensation to Elder.

On the first day of March, 1924, the case came on for trial in the District Court of Steele County, Minnesota.

THERE WAS NO JUDGMENT EVER ENTERED OR RENDERED IN IOWA AFFECTING RESPONDENT.

The only adjudication in Iowa was the *order or award* of the Deputy Industrial Commissioner of that state.

After the verdict in the present case, and on March 5th, 1924, the order of the Deputy Industrial Commissioner was reviewed and affirmed by the Industrial Commissioner of Iowa.

This later order, made after the trial, has no bearing on the case.

Interstate Commerce.

Elder was engaged in interstate commerce under the *undisputed facts* shown at the trial. His last work before being injured was to set the brakes on two interstate cars. He then accompanied an engine onto one of defendant's main line tracks to get water and dinner, intending to return to complete his work about the interstate cars.

On the question of interstate commerce the petitioner, on page 4 of its brief, says:

> "For the purpose of argument only, *we will concede an issue of fact.*"

The trial court submitted the question of interstate commerce as a fact question to the jury.

The Supreme Court of Minnesota held the work to be interstate.

We have, therefore, a situation where it appears that plaintiff in the court below was actually, and concededly, engaged in interstate commerce at the time he received his injuries. He commenced his action in the District Court under the Federal

statute. *After he commenced the action,* the railway company attempted to prevent the exercise of his Federal right by making application to the Iowa Industrial Commission, seeking to have him awarded compensation under the Iowa Compensation Act.

The Deputy Industrial Commissioner found for the railway company and awarded respondent compensation under the Iowa Act.

There was *no judgment* entered, and there was *only an award* of the Deputy Commissioner. This was pleaded as a bar, it being claimed at first that it was a "judgment," and, secondly, that if not a "judgment," that it was an adjudication of the fact of intrastate commerce.

The Deputy Industrial Commissioner of Iowa found as a fact that Elder's work was intrastate.

The District Court of Minnesota and the Supreme Court of Minnesota found as a fact that the work was interstate.

The Question for This Court.

Can the Iowa Industrial Commission, by an *award* of its Deputy Commissioner, *defeat a right of action of an employee under the Employers' Liability Act?*

The above is the question for determination by this court.

It is to be borne in mind that the plaintiff, below, started his action under the Employers' Liability

Act *before any proceedings were started under the Compensation Act.*

RESPONDENT'S CONTENTION.

Respondent contends that a writ of certiorari should not be granted because:

1. There was *no judgment* in the State of Iowa, the *order* or *award* of the Deputy Industrial Commissioner not being a judgment.

2. The law of the United States is supreme and *after* an action is commenced under the Employers' Liability Law the right to maintain it *cannot be defeated by subsequently commenced proceedings before the Iowa Industrial Commission.*

3. Respondent was, as a fact and as a matter of law, as disclosed by the record, engaged in interstate commerce at the time he was injured.

4. That the writ of certiorari herein is sought solely for the purpose of delay.

THE POSITION OF THE MINNESOTA SUPREME COURT.

All the questions urged here were urged before the Supreme Court of Minnesota.

That court held against the railway company for the following reasons:

1st: That plaintiff was engaged in interstate commerce and the Federal Act was supreme and could not be interfered with by any state tribunal (page 250, Record).

2nd: The Compensation proceeding went no further than *a finding* by the Deputy Commissioner which could not be a bar to the action under the Federal statute; in other words, that there was *no judgment* of a court of the State of Iowa.

ARGUMENTS, POINTS AND AUTHORITIES.

1. There was *no judgment* in the State of Iowa, the order or award of the Deputy Industrial Commissioner not being a judgment.

The claim in the petition that the District Court of Steele County, Minnesota and the Supreme Court of Minnesota did not give full faith and credit to a "judgment" of the State of Iowa is unfounded, as a fact.

The claimed "judgment" in the State of Iowa was *merely an award* of the Deputy Industrial Commission.

While petitioner uses the term "judgment" somewhat loosely in its petition, there is no claim that there was an actual "judgment" entered, but merely that an act of the Deputy Industrial Commissioner of Iowa *amounted to* a "judgment."

The Iowa Industrial Commission is not a court. The Compensation Act in itself provides that the orders of the Deputy Commissioner, and later on review of the Commissioner, may, *upon application to the District Court, ripen* into a judgment.

The District Court of Iowa never entered any judgment pursuant to the award of the Deputy Industrial Commission.

Under the Constitution of the State of Iowa, it is provided:

> "The judicial power shall be vested in the Supreme Court, District Court, and such inferior *courts* as the General Assembly may from time to time establish."

In the case of *Hunter v. Colfax Consolidated Coal Co.*, 154 N. W. 1037, the Iowa Supreme Court upheld the Compensation Act.

It never held, however, that the Deputy Commissioner or the Commission was a *court*. It simply held that because the Commission was given some powers of a judicial nature did not render the statute unconstitutional.

In many cases, it has been held that boards, such as Compensation Boards, Railroad Commissions, etc., are not courts.

> See *State v. Railway Company*, 85 Iowa 516, 52 N. W. 490.

In *Hawkins v. Bleakly*, 243 U. S. 210, 61 L. Ed. 678, the Iowa Compensation statute was before the Supreme Court of the United States for consideration. In that case the act was sustained, Mr. Justice Pitney writing the opinion for the court, saying that it

> "* * * provides for a hearing before *an administrative tribunal* for *judicial review* upon all *fundamental* and *jurisdictional* questions."

In other words, the Commission is *an administrative body*. It has the duty common to such administrative bodies, but is not a judicial tribunal.

Mr. Justice Pitney quoted from the Hunter case, referred to by counsel for petitioner herein, the following language:

> "We hold that though the act does not in terms provide for judicial review, except by said appeal, *the statutes does not take from the courts all jurisdiction* in the premises."

Following this quotation, Mr. Justice Pitney said that the act prescribed the measure of compensation,

> "and the circumstances under which it is to be made and establishes *administrative machinery* for applying the statutory measure to the facts of each particular case."

In *Mississippi Railroad Commission v. Illinois C. R. Co.*, 203 U. S. 335, 51 L. Ed. 209, there was a suit to enjoin the enforcement of an order of the Mississippi Railroad Commission.

The Commission took the position that the Federal Court could not enjoin because of Section 720, United States Revised Statutes, which prohibits a Federal Court from issuing the writ of injunction *"to stay proceedings in a state court."*

The question then came up as to whether or not the Commission was a court within the meaning of that statute.

The Supreme Court of the United States, in the opinion by Mr. Justice Peckham, held that the Commission was *not a court* within the meaning of that statute, saying:

> "The Commission is, however, not a court and *is a mere administrative agency of the state.*"

In Minnesota it has been stated that a court of record is a court having common law jurisdiction and whose powers are exercised according to the course of the common law.

> *State ex rel. v. Webber,* 96 Minn. 422, 105 N. W. 105.

In *State ex rel. Wallace v. Craemer,* 85 Ohio St. 349, 97 N. E. 602, the Ohio court had for consideration the compensation statute passed by the Legislature of the State of Ohio. This was one of the early compensation statutes passed in this country.

It was claimed by the Ohio court that the act creating the Compensation Board delegated judicial power and, therefore, was invalid.

The Supreme Court of that state, however, in its opinion in that case said:

> "Of course, if the Board is a court, there is an end of the whole matter, the statute would be unconstitutional. * * * WE DO NOT CONSIDER THE BOARD OF AWARDS A COURT OR INVESTED WITH JUDICIAL POWER within the meaning of the Constitution. It is created by the act PURELY AS AN ADMINISTRATIVE AGENCY," which "does not vest it with judicial power within the constitutional sense."

Speaking of a proceeding under that statute analogous to the review under the Iowa Act, the court said that the "appeal"

> "is not an appeal in the sense of appealing from one court to another, but is really the beginning of an original suit."

From the cases cited above, it is clear that *there is no judgment of any court of record in the State of Iowa.* There could therefore be *no failure* by the Minnesota court *to give full faith and credit* to the judgment of a sister state.

There was no judgment to which to give full faith and credit.

RES ADJUDICATA OR ESTOPPEL FOR STATE COURTS.

It being shown that there was no judgment of a sister state involved, there could, of course, be no constitutional question as to the failure to give full faith and credit to the judgment of a sister state.

The act of the Deputy Industrial Commissioner is, however, set forth as a bar, even though it was not a "judgment."

Whether this act be or be not a bar is clearly a question for determination by the state court.

It presents no matter for the Supreme Court of the United States. The Minnesota Supreme Court as well as the District Court held that the plea of estoppel or *res adjudicata* was unavailing.

There being no "judgment" involved and no constitutional question to consider, the claim of *res adjudicata* or estoppel cannot now be considered by the Supreme Court of the United States because it presents merely a question for determination by the state court.

It does not present a Federal question in any sense, and does not give rise to any ground for the granting of a writ of certiorari.

2. The law of the United States is supreme and after an action is commenced under the Employers' Liability Law, *the right to maintain it cannot be defeated by subsequently commenced proceedings* before the Iowa Industrial Commission.

It can hardly be contended that the State of Iowa

can *interfere*, by an act of the Industrial Commission, or by any act of any legislative or executive body of the state, *with a Federal right.*

It is conceded in the petition that the Federal law is supreme, on page 11 of the petition, where the case of *Erie R. Co. v. Winfield*, 244 U. S. 170, among others, is cited.

Assuming the Federal law to be supreme, it is difficult to see what question there is for this court to determine in the case at bar.

Elder's right was that given by a Federal statute. The attempt to defeat the right was because of proceedings subsequently started under the State Compensation Law of Iowa.

Under the situation existing at the trial, when the offer was made to introduce the award of the Commissioner as a bar to the prosecution of the action under the Federal law, either the Federal Law had to yield to the State Law of Iowa, or the State Law of Iowa had to yield to the Federal Law.

The trial court held the Federal Law was supreme, and the rights of Elder could not be interfered with by any proceedings started before the Deputy Commissioner of Iowa subsequent to the commencement of his action to recover under the Federal statute.

The Minnesota Supreme Court took the same position.

A mere statement of the case shows that both the Minnesota courts were correct in the position they took.

It is to be remembered that the respondent,

Elder, at all times *resisted the attempt* of the Iowa Commission to award him compensation. When notice was served on him he filed an objection to the consideration of his case by the Commissioner, and in his objection set forth that his rights were governed by the Federal statute and that he had commenced an action in the District Court of the State of Minnesota.

3. Respondent was, as a fact and as a matter of law, as disclosed by the record, engaged in interstate commerce at the time he was injured.

Elder was engaged in interstate commerce under the undisputed facts in the case and under the concession of petitioner on page 4 of its brief:

"We will concede an issue of fact."

Respondent Elder was, as a matter of fact, under the record, engaged in interstate commerce.

Assuming this fact, Elder's rights could not be limited in any way by any state statute.

4. That the writ of certiorari herein is sought solely for the purpose of delay.

Viewing this record in its entirety and considering the facts:

1st. That there was no "judgment" in the State of Iowa, but merely an award of the Deputy Industrial Commissioner.

2nd. That the Federal law is supreme and is in conflict with the Iowa statute.

3rd. That Elder, as a matter of fact, was engaged in interstate commerce.

4th. That the decisions of the District Court and Supreme Court of Minnesota were unanimous in upholding Elder's claim of a Federal right—we cannot but come to the conclusion that the writ of certiorari in this case is prosecuted solely for the purpose of delay.

There is in fact no merit to the claim of petitioner.

A right under a state statute was set up to defeat a right under the Federal law. There is nothing upon which to base the claim that the writ of certiorari should be granted.

Should the writ be granted the Supreme Court could only hold, as it has in so many cases, that the law of the United States is supreme and that it cannot be brushed aside, nor rights thereunder denied because of any state statute.

CONSIDERATIONS OF PETITIONER'S POINTS AND AUTHORITIES.

On page 9 of the brief in support of the petition, appears the heading: "Binding Effect of the Iowa Judgment."

In several places, the Iowa "judgment" is referred to.

There was *no judgment in Iowa.* There was merely a finding of the Deputy Industrial Commissioner which had not even been approved by his superior

officer at the time the verdict in the case under the Federal Act was rendered.

ESTOPPEL.

Under the claim of estoppel, it is said that the finding of the Deputy Commissioner, although not *res adjudicata* in the broad sense, constitutes an estoppel because of the finding of intrastate commerce as a matter of fact.

Congress intended rights under the Federal Act to be determined in courts operating according to the common law. It was not intended that these rights be determined by a Deputy Compensation Commissioner.

Petitioner here claims that the Deputy Commissioner could determine the question of interstate commerce so as to bind the plaintiff.

In many cases interstate commerce is a question for the jury.

If petitioner be correct, a Deputy Commissioner could determine this question, and plaintiff will be deprived of his right to a jury trial.

Furthermore, after plaintiff had started this action under the Federal law, the railway company could apply to the Commission, have an award made by the Deputy Commissioner, and then, under the claim of *res adjudicata,* bar plaintiff from further pursuing his Federal right.

The statement of the proposition answers it.

Defendant could not be permitted to follow such a course in the hope of success, because, as has been

so often said, the Federal law is supreme and to it every state statute must yield.

On page 10 of the brief in support of the petition it is said that the only two authorities in the country are contrary to the conclusion reached by the Minnesota Supreme Court.

This is not correct. The *Williams case*, 202 Pac. 356, was one where *the beneficiary herself sought compensation* from the Compensation Board.

In the case at bar, *the railway company sought to have the award made*, and it was resisted by respondent.

In the case of *Dennison v. Payne*, 293 Fed. 333, there was merely an inference that a *judgment* might be binding, but the case was defeated on the ground that there was no identity of parties. Neither case is authority for petitioner's position.

The petition for a writ of certiorari should be denied.

No Federal question is involved.

There is no judgment of a sister state.

The questions determined are wholly for the State Court.

Respectfully submitted,

TOM DAVIS AND
ERNEST A. MICHEL,
419 Metropolitan Bank Bldg.,
Minneapolis, Minnesota,
LEACH & LEACH,
Owatonna, Minnesota,
Attorneys for Respondent.